COMMENTS

ON

THE CODE OF CIVIL PROCEDURE,

ACTS VIII. OF 1859 & XXIII. OF 1861,

WITH

FORMS OF PLAINTS, MEMORANDUM OF APPEAL, ETC.

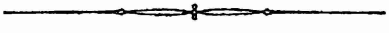
TOGETHER WITH

THE ACT OF PARLIAMENT FOR ESTABLISHING HIGH COURTS, THE CHARTER OF THE HIGH COURT AT CALCUTTA, AND THE DESPATCH OF THE SECRETARY OF STATE FOR INDIA RELATING THERETO.

THIRD EDITION,

COMPRISING

THE CONSTRUCTIONS OF THE CODE GIVEN BY THE SEVERAL SUDDER COURTS AND THE CALCUTTA HIGH COURT.



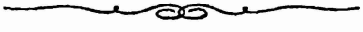
BY THE LATE

RUMAPRUSAD ROY,

GOVERNMENT PLEADER IN THE CALCUTTA SUDDER COURT.

No Code can supersede the profession of the lawyer. But as long as men, including lawyers, are fallible, so long their legislative labours require *correction* and *elucidation*.

Lord Brougham.



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PREFACE.

THE following Comments on the Code of Civil Procedure were designed for the benefit of the Native and European judicial officers and legal practitioners, as well as suitors and students of law in general. The objects in view were, to explain and illustrate difficult and doubtful sections, to point out the difference between the former procedure and that now prescribed for the guidance of the Courts, and to exhibit the improvements which have been engrafted on the previous system.

When I put the original work to the press, I remarked that, if my labours proved serviceable, I should deem myself amply compensated. The demand for the work exceeded my expectations. I took advantage of the call for another edition, to improve the work, by including in it notes of the constructions that had been put on the Code, by the Sudder Courts of the several Presidencies.

The second edition too was rapidly exhausted. Since the issue of it, important changes have been made in the law relating to the administration of civil justice, especially by Act XXIII. of 1861. The provisions included in this enactment are of themselves sufficient to justify the publication of another and revised edition of the Comments, in order to exhibit the modifications which have been made in the Procedure of the Civil Courts. The issue of such an edition is still more required in consequence of the measure, long and ardently expected, which has just taken effect, the establishment by Royal Charter of the High Court of Judicature of Bengal, by the amalgamation of the Supreme and Sudder Court in Calcutta. That measure leaves the Code of Civil Procedure still applicable to *all* descriptions of original suits and appeals, to which it was originally intended to apply, and at the same time extends its use in all original suits which were formerly triable by the Supreme Court. This work is, consequently, as much a *desideratum* as ever, and not less so to the practitioners of the late Supreme Court, many of whom will now be largely engaged in the management of such suits and appeals.

In fact, the modification of the Code itself, made by the Act above cited, and the extensive alterations in the law, caused by the establishment of the Revenue Courts (Act X. of 1859, modified by Act VI. of 1862 of the Bengal Government,) and the Mofussil Small Cause Courts, (Act XLII. of 1860, amended by Act II. of 1862 of the Bengal Government,) and by the enactment of a new Stamp Law, (Act XXXVI. of 1860, since superseded by Act X. of 1862,) render this edition of the Comments virtually a new work, while its value is enhanced by

the incorporation in it of the numerous later constructions issued by the Sudder Courts.

The Rents' Law for the Bengal Presidency (Act X. of 1859) was passed so soon after the Code of Civil Procedure as to seem intended to form a part of the latter. The subject of it appears to be sufficiently distinct from the subjects of litigation in the ordinary Civil Courts. But experience has shown that there are cases, as to which it is necessary to decide whether they come within the province of those Courts or that of the Revenue Courts. Reference has, therefore, been made to such cases, in this edition, as likely to be useful to the judges and practitioners of both classes of Courts.

The Small Cause Courts for the Mofussil will have the effect of curtailing the jurisdiction of the Civil Courts, within whose local limits they may be established. The judges of the Civil Courts are required, therefore, to take notice of the powers conferred on the local Small Cause Courts, to avoid coming into collision with them, or usurping the functions with which they have been invested. With the establishment of these Courts, the amount or value of suits appealable to the ordinary Civil Courts has been reduced, and the range of special appeals very much narrowed.

From these causes, this edition of the Comments will comprise a greater variety of subjects than the first two editions, and be serviceable to others also than those for whose benefit those were prepared. The Procedure framed for the ordinary Civil Courts is obligatory on the new Revenue and Small Cause Courts, except where special rules have been enacted for their guidance. The appeals from the decisions of the former (the Revenue Courts) are to be heard by the district courts, and by that division of the High Court which is to occupy the place of the late Sudder Court; and references on doubtful points from the latter (the Small Cause Courts) are in effect of the nature of appeals to the Court indicated. It is obviously necessary that the judges and practitioners of the newly constituted Revenue and Small Cause Courts should study the Code of Civil Procedure, with the same close attention that is required from those attached to the tribunals for whose guidance it was especially designed.

The alterations in the Stamp Law, which were under consideration when this work was published, were mentioned in notes as the second edition was going through the press. The proposed rules became law by the passing of Act XXXVI. of 1860, (which itself has been superseded by Act X. of 1862). The substance of those notes has consequently been placed in the text. Such parts, moreover, of the Stamp Law in force, as seem requisite to a clear comprehension of the duty of the Courts on the subject, have been inserted.

I cannot conclude these prefatory remarks without expressing my cordial acknowledgments to those gentlemen, who, amidst important and pressing public avocations, kindly revised these sheets as they passed through the press, or furnished me with the constructions of the several Sudder Courts.

INTRODUCTORY REMARKS.

THE alterations effected by the Charter, issued under the authority of the statute 24 and 25 Victoria, chapter 104, are in substance these.

The Sudder Dewanny and Nizamut Adawlut will continue, under the denomination of one or more Division Courts of the High Court of Judicature, to exercise the powers it heretofore possessed within the local limits of its jurisdiction. Its *materiel* is, however, improved by the appointment of at least five barristers, and some Principal Sudder Ameens, Judges of Small Cause Courts, or pleaders of the Sudder Court. It will administer civil justice according to the Hindoo and Mahomedan laws and the Regulations and Acts of Government, under the Code of Civil Procedure, (Acts VIII. of 1859, and XXIII. of 1861,) and criminal justice according to the Indian Penal Code, (Act XIV. of 1860,) under the Code of Criminal Procedure, (Act XXV. of 1861).

The Supreme Court will continue, under the style of one or more Division Courts of the High Court of Judicature, composed exclusively of barrister Judges, to act as a Civil Court, administering the English, Hindoo, and Mahomedan laws and equity, as a Civil and Criminal Court of Admiralty, as Courts exercising testamentary, intestate, and insolvency jurisdiction, and as a Christian Divorce Court, within its former local limits, (Calcutta,) and also exercise authority over all European British subjects within the Presidency of Fort William, including the North Western Provinces and the Non-Regulation Provinces Proceedings in civil cases will be in conformity to the Code of Civil Procedure enacted for the Mofussil Courts, which necessarily includes the use of stamps in pleadings, exhibits, decrees, &c. One of these Division Courts will also exercise criminal jurisdiction over all persons heretofore subject to the Supreme Court in Calcutta and throughout this Presidency;—the Indian Penal Code constituting the substantive criminal law to be administered, and its Code of Criminal Procedure consisting of the rules of English law hitherto observed.

These changes are not likely to be considered as equivalent to the promised amalgamation, or, to use the words of Sir Charles Wood, fusion of the Supreme and Sudder Courts. The grand objection to the separate existence of those Courts was, their exercising various and anomalous jurisdictions under different rules of proceeding and practice. The anomalies in existence are rather made more prominent by the very attempt to effect a union of different courts acting under various forms and systems of law. Thus criminal justice is to be administered—to the natives of India—according to the Indian Penal Code and Code of Criminal Procedure, but—to the natives of the United Kingdom and their descendants—according to the Indian Penal Code and the forms of pleading and procedure of the English law, modified by Acts of the Local Legislature, in conformity to changes made by Statutes, or to meet defects that were discovered. So, again, civil justice, as well within

Calcutta as throughout the Presidency of Fort William, is to be regulated by the same Code of Civil Procedure, including the uniform use of stamps in pleadings; but the same multiform substantive law, which before prevailed, is still to be administered. The introduction of this Code of Civil Procedure, in the Divisions of the High Court which are to stand in the place of the Supreme Court, is much thought of in high quarters. The Secretary of State for India not only considers it calculated to "prove a very salutary provision," but thinks that it alone "accomplishes the object so long contemplated of subtituting one simple Code of Procedure for the various systems (corresponding to the common law, equity, and admiralty jurisdictions) which have been in operation in the Supreme Court since the date of its establishment." This is certainly much at variance with the public opinion. The "object long contemplated" was not uniformity of procedure in the Supreme Court, but uniformity of law and administration throughout India.

It would be difficult to say why the English criminal law is superseded, while the English municipal law is retained, or why the English civil procedure has been superseded by the Indian, unless as a means of increasing the stamp revenue.

The only change which appears promising, consists in the power, bestowed on the Crown, of appointing barristers, Principal Sudder Ameens, Judges of the Small Cause Courts, and Vakeels of the Sudder Court, as Judges of the High Court, to be employed in those Divisions of it which are to dispose of appeals from the civil district courts of Bengal. This power has as yet been but partially exercised. By the Act of Parliament the Judges of the Supreme Court are to be members of the High Court first formed, and to take precedence of the Judges of the Sudder Court, who are also to be Judges of the High Court without further appointment. The High Court formed is accordingly composed of the Judges who were attached to the late Supreme and Sudder Courts, and of two members of the English bar and three members of the Bengal Civil Service, who, though they had not signalised themselves at the bar or on the bench, are nominated in the Charter for establishing that Court. But no Principal Sudder Ameen or Vakeel of the Sudder Court was appointed simultaneously with those barristers and Civil Servants, as an acknowledgment of the merits of those classes who had "borne the burden and heat of the day," and were therefore entitled to especial consideration on the introduction of these new arrangements, and not less than from deference to the sentiments and expectations of the native community, of which indeed neither the local Government nor the home authorities can plead ignorance. This inauspicious inauguration of the High Court was calculated to excite a foreboding that the provision on this point, ultimately included in the Act, would be as little acted upon as was the famous but delusory declaration in the Charter Act of 1833, that no person should be excluded from any public office by reason of colour, descent, place of birth, or religion.—*Absit omen!*

The Code of Procedure was prepared by the Royal Commissioners, in view of the amalgamation of the Supreme and the Sudder Court, for *all* the Courts of Civil Judicature in Bengal, excepting the Small Cause Court in Calcutta and Military Courts of Requests.

The Indian Legislative Council, seeing the probability of the amalgamation to be still remote, adapted the "proposed Code" to the circumstances of the Sudder Code, though retaining almost all that was especially required for the Supreme Court. The preliminary portion of it, relating to the constitution and jurisdiction of the intended High Court, was necessarily omitted. But as that portion has been generally incorporated in the statute and Charter abovementioned, this Edition of the Code is preceded by those laws.

Since the revision of the "proposed Code," there have been established the Revenue Courts under Act X. of 1859, and Small Cause Courts, under Act XLII. of 1860, at some of the considerable towns and places in the interior.

The "proposed Code" contemplated the entire disuse of stamps in the Civil Courts, and of oaths and affirmations in judicial proceedings, as well as the abolition of appeals in suits for amounts below 50 Rupees, and of special appeals altogether. The Indian Government very injudiciously resolved not to forego the trifling revenue derived from stamps, although the increase of the revenue from other sources led it to abolish several more productive and less objectionable duties. In their zeal for stamps, they have even required stamps in Military Courts of Requests, and for a time abolished the long standing rule, by which summary suits for rent were allowed to be instituted on stamps of one-fourth of the value prescribed for ordinary civil suits. Stamps, as noticed by the Royal Commissioners, were never required in the Supreme Court, nor, under the original system of the Marquis Cornwallis, in the Courts of the East India Company. The impropriety of a tax on justice is too obvious to require proof. The harassments and perplexities occasioned to suitors, as well as judges, by the particular rules as to the value of the stamps to be used under various circumstances, (of which these Comments afford several striking illustrations,) are in themselves sufficient grounds for adopting the recommendation of the Royal Commissioners. It is to be hoped that the subject will be reconsidered, and so obnoxious a feature of the Code, which caused some embarrassment on the establishment of the High Court, removed.

Oaths and affirmations have been retained in the Code. It contains a direction for the administration of oaths and affirmations to witnesses, but is silent as to the mode in which parties, commissioners, and others, are to be examined. The absence of such directions, for these and other cases, must occasionally cause embarrassment.

In modifying the "proposed Code" by the introduction of provisions for the admission of special appeals, and the alteration of some of the former rules on the subject, sufficient care was not taken to assimilate the forms regarding the two descriptions of appeals which are allowed. Again, the anxiety professed for uniformity of procedure is not quite reconcilable with the recent law on the subject, by which the decisions of one class of judges are declared to be final, and similar decisions of judges of another class are barred from being reviewed in special appeal, on points of law. These conflicting enactments and complicated rules have a tendency to distract pleaders and judges, as well as to interfere with the proper administration of justice.

It is singular that Her Majesty's Government did not perceive, that the rules for effecting the amalgamation of the Supreme and Sudder Court would have been best drawn up by the Judges of those Courts, assisted by the barristers and vakeels, whose practice in them had familiarised them with the routine of procedure, and rendered them more competent than any persons in England to indicate the details, by which the object in view could most readily be accomplished. It was easy both to anticipate that "confusion and uncertainty" would result from the passing of an Act of Parliament to authorise the issue of a Charter for the establishment of the High Court, and to foresee the probability, when some rules regarding it were inserted in the one, and others left to be included in the other, that there would be "omissions which might impede the proper action of the Court." Such omissions, the Secretary of State for India is compelled to instruct the Local Legislature, to take "immediate steps for supplying." There can be no doubt that both uniformity of system and complete provision for the working of the

High Court would have resulted at once, had the Parliament simply authorised the Indian Government, vested as it is with the most extensive powers of legislation, to abolish the two Courts in question and form one of a homogeneous character, such as had been so long contemplated.

The appointment of barristers as Judges of the High Court is expected to be very beneficial. But it is not clear how it will operate towards improving the character of the decisions of the Court, when the majority of its Judges are persons who have not been trained to the law. If the Chief Justice preside over any Division court, his opinion cannot permeate through or influence the opinions of the other judges who sit with him; nor can these with propriety or decency be reduced to the rank of assessors, by providing, as Sir Charles Wood suggests, in another case, (para. 23 of his despatch,) "that the judgment shall be in accordance with the opinion of the senior of the judges constituting the Division court." The barristers cannot be equal, in point of local knowledge and experience and acquaintance with the Vernacular languages, to the other judges, or even acquire great ability as judges for several years after their appointment.

"In selecting a judge, (it has been said,) it is better, if some abatement in fitness is to be made, to abate something in legal lore, than in general knowledge. For, if we suppose the average duration of a judge to be ten years, in three years of constant practice the man of a cultivated mind, who had some previous acquaintance with the subject, will become a blameless lawyer, and for seven years the public will have the benefit of his services, which will be incalculably and incomparably superior to those of the mere uninformed lawyer." (Westminster Review, 1829).

On the other hand, and for the reasons just hinted at, the disposition to form full benches of less than three judges, must be a cause of serious dissatisfaction to the community. When the judicial institutions of Bengal were formed, the principle adopted was that of having all suits of importance fully investigated, by as competent and as ample a body of judges as the Government could provide. The presence of at least two judges of the courts of appeal was deemed necessary; and differences of opinion were to be reconsidered at sittings with the third judge. From a principle of economy, all subsequent legislation abounded with expedients for substituting single judges for full benches, until, in 1829, the Provincial Courts were abolished, and a fashion, before unheard of, was introduced, of allowing single judges of the Sudder to reject petitions of appeal upon the bare perusal of the decrees to which they referred.

When the current set the other way, and the judge of the Sudder Court, who, sitting alone, considered a decision that had been appealed from, liable to be reversed, had to hold a second sitting with two other judges, for the purpose of deciding it, the decree doomed to reversal was as often confirmed as not. Hence the Sudder Court came to a resolution, that it would be both more economical and dignified that three judges should invariably sit upon all cases without exception. With this system the public were content. The fact was mentioned before the Lords' Committee on Indian affairs, but seems not to have received the attention that was due to it.

The Local Legislature, however, resolved, about a year ago, against the remonstrances addressed to them by the community, and the strongest reasons offered by the press, that ordinarily but two judges should sit for the hearing of appeals. The plan selected too, for avoiding a reference to a third judge, when the two differ in opinion, is most extraordinary and probably quite unprecedented. It is that the finding, as to facts, of the judge whose decision is impugned by the appeal, shall be taken as correct and unexceptionable.

The motive for the introduction of the rule that appellate courts shall consist of two judges, was declared to be economy—"to afford relief to the Sudder Courts in this Presidency," which were overwhelmed with business It is remarkable that all the expedients which have successively been resorted to, from such a motive,—to avoid the establishment of Courts of appeal, consisting of not less than three judges sitting together,—have proved not only unsatisfactory, but in the end far more costly. But were it otherwise, economy cannot justify the adoption of an improper system of administering justice, any more than it would meanness or dishonesty in private life. Nor does the excess of suits in one Presidency justify the extension of that system into all the Presidencies, where the same ground has no existence. The excess in this Presidency is in fact owing to the growing wealth of the country, from the progressive extension of agriculture, manufactures, and commerce; and the people would prefer the imposition of taxes, if those recently imposed have not proved productive enough to allow of the addition of a few extra judges in the Sudder Courts, to seeing a deterioration of the highest appellate courts in the country, when they have for a number of years been anxious for their improvement.

The Act of Parliament, which authorises the establishment of High Courts of Judicature, goes a step further in this retrograde course.

It authorises one or more judges, or Division Courts constituted of two or more judges, to exercise original and appellate jurisdiction, the Chief Justice having the power "from time to time" to "determine what judge in each case shall sit alone, and what judges, whether with or without the Chief Justice, shall constitute the several Division Courts." In the event of two judges, who form a Division Court in original cases, differing in opinion, the Secretary of State for India foresees "a difficulty." He recommends that "the judgment shall be in accordance with the opinion of the senior of the judges constituting the Division Court," which is the expedient adopted in Section 9, Act XII. of 1862, (*vide* Appendix, p. xviii.) and which would render the junior no better than an assessor. If this principle be adopted, it would be preferable to let the senior judge sit alone, unless the judgment of the junior (which may be as good as that of his colleague) is to be recorded at length and recited in the decree. An alternative is proposed, which is, to allow the judgment to be passed, according to the opinion of the senior, "for the purpose of an appeal against the same;" but what if the party cast should not choose to undergo the expense, delay, and vexation of an appeal?

It is strange that Sir Charles Wood could not hit upon a better expedient. For such a case, (he says,) the Code of Civil Procedure, "which is adapted to Courts of first instance, presided over by single judges only, contains no provision." That Code now provides that when two judges differ, "the judges shall state the point upon which they differ, and the case shall be re-argued upon that question before one or more of the other judges," &c. Sir Charles does not say whether he alludes to differences on points of law or questions of fact. If to the former, nothing can be easier than to adopt the plan of the Code, to have the point "re-argued." If to the latter, it would suffice to let the third judge go through the notes of evidence, assisted by counsel or vakeels,—to which no objection can be made, since it is no doubt to be the plan on which criminal trials (upon written evidence merely) are to be tried by that Division of the High Court which is to replace the Nizamut Adawlut.

It is probable that the appeals from the District Courts will generally or perhaps invariably be heard by Division Courts consisting of not more than two judges, agreeably to the new system introduced under Act XXIII. of 1861.

But this plan, as already remarked, is unsatisfactory to the public, especially as it is a retrograde course, and, to say nothing of its logical inconsistencies, one involving make-shifts, which are always undignified and displeasing, even if not liable to the objection of being attended with expense and delay.

This part of the Code requires re-consideration, with a view to remove the dissatisfaction created by injudicious alterations in a system that worked well and was in consonance with the wishes and requirements of the people. No motive of economy should have any influence, when the question is the due administration of justice to the people of one of the most productive and considerable provinces of the empire, who have a right to expect that every suit, the result of which may be either affluence or the lowest poverty, an unsullied character or a stigma of infamy, will receive full consideration, in the last resort, from a suitable number of honest and able judges.

As the working of the High Court, now established, is to be reported within two years to the Home Authorities, with a view to correcting the defects and supplying the omissions, incident to a scheme projected in one hemisphere to be carried into effect in another; and as the suggestions, offered in the former editions of this publication, have, in several instances, received the attention of the local Legislature, and led to the improvement of several of the provisions of this Code, especially as regards appeals, it is to be hoped that the views above expressed on a point of so much importance as the constitution of courts of appeal, involving not less the dignity of the law and the honor of the administration than the satisfaction of the community, will meet with due consideration.

Though this Code professes to simplify the rules of procedure, and substitute for them a "natural" procedure, it is found that, for the lowest Courts, the procedure prescribed by it is neither simple nor natural, as the so-called natural procedure is blended with a mass of technical forms, while, for the superior Courts, it is inadequate and liable to cause injustice and harassment. It requires persons of even the upper classes of society to appear in Courts, in violation of social customs, which are far stronger than positive laws, and would deprive all of the benefits of the advocacy of professional advisers, without whose aid they are either helpless or liable to be ensnared into acknowledgments tending to undeserved loss or unmerited self-crimination. It seeks to throw the duties of advocates, in almost every stage of a suit, on the judges, who are admitted to be ill-qualified for them. At the same time it withholds from the people the great safeguard and advantage of juries in any form. The results cannot but be injurious. A plaint, for instance, is rejected by the lower Court as diffuse, but pronounced by the appellate Court to be succinct. In another instance, a plaint is filed with the approbation of the judge, but rejected by his *locum tenens* for being multifarious; while the Court of appeal admits that it contains much irrelevant matter, but declares that it was the duty of the judge to retrench its superfluities, in other words, to act as counsel for the plaintiff, in *settling* his pleading.

The defects of the Code have been augmented by the subsequent alterations, above alluded to, by which appeals are allowed from the decisions of certain Courts and not from those of others of the same description, and certain suits are declared cognisable in particular Courts, the presiding officers of which are not appointed with reference to their judicial training, but withdrawn from the cognisance of the ordinary civil Courts, except in the form of appeals. The cases in which appeals may or may not be preferred, and, if preferrible, to what Courts appeals may be preferred, and under what conditions and limitations, are so various, and surrounded with so nice distinctions, that nothing but confusion and uncertainty can result from these refinements

of legislative acumen, not inferior to that which could split a hair 'twixt north and north-west side.

In the first and second editions of this work, defects of the kind were slightly touched upon. As it was the object of the work to indicate and explain the improvements effected by the Code on the former procedure, it was not deemed advisable to notice the defects prominently. Some of these are of late introduction, such as the reduction of the number of judges who were to form appellate Courts and the limitation of special appeals to cases of certain species. It is now time that all defects should be pointed out, with a view to that *correction*, which Codes, as well as other "legislative labours," in course of time, require.

The proper time for making the *corrections* is undoubtedly the time when the defects are pointed out and proved to exist. Those who were concerned in promulgating this Code did not hesitate to make amendments as soon as they were perceived to be necessary, though unfortunately they have, simultaneously, re-admitted some provisions which experience had already condemned. It is neither right nor candid to speak of objections to the portions which require correction as *theoretical*, or to insist on giving the new procedure a longer trial. For the provisions of the Code, so far as they are novel, are in fact founded on theories, and it is not necessary to wait till the objections to them are realised by experience. Such an argument may be used on behalf of a young judge, who has had no judicial training, or a new minister, whose character and abilities are as yet unknown to the people. Both may improve by practice and study, and amend by the criticism and censure of their acts. But the longer a rule, proved to be bad, is allowed to be in force, the more extensively mischievous will it be in its operation. A Code cannot be improved except by *correction*. Moreover, it is unnecessary to delay the displacement from the Code of provisions, such as those regarding paupers and insolvents, (copied, without examination, from the previous procedure,) which have been exploded, or superseded, in other countries, by measures founded on improved principles of legislation, and found to work in an unexceptionable manner.

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THE

ACT OF PARLIAMENT,

24 & 25 VICTORIA, CHAPTER CIV.

(6TH AUGUST 1862,)

FOR ESTABLISHING HIGH COURTS OF JUDICATURE IN INDIA.

High Courts may be established in the several Presidencies of India.

BY this Act, it is enacted as follows.

1. It shall be lawful for Her Majesty, by letters patent under the great seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal division of the Presidency of Fort William aforesaid, and by like letters patent to erect and establish like High Courts at Madras and Bombay for those presidencies respectively, such High Courts to be established in the said several presidencies at such time or respective times as to Her Majesty may seem fit; and the High Court, to be established under any such letters patent in any of the said presidencies, shall be deemed to be established from and after the publication of such letters patent in the same presidency, or such other time as in such letters patent may be appointed in this behalf.

Constitution of High Courts.

2. The High Court of Judicature at Fort William in Bengal, and at the presidencies of Madras and Bombay respectively, shall consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty may from time to time think fit and appoint, who shall be selected from—

1st. Barristers of not less than five years' standing; or,

2nd. Members of the covenanted Civil Service of not less than ten years' standing, and who shall have served as Zillah Judges, or shall have exercised the like powers as

those of a Zillah Judge for at least three years of that period; or,

3rd. Persons who have held judicial office, not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court, for a period of not less than five years; or,

4th. Persons who have been pleaders of a Sudder Court or High Court for a period of not less than ten years, if such pleaders of a Sudder Court shall have been admitted as pleaders of a High Court.

Provided that not less than one-third of the Judges of such High Courts respectively, including the Chief Justice, shall be barristers, and not less than one-third shall be members of the covenanted Civil Service.

Certain existing Judges herein named to be the first Judges of the High Court.

3. Provided always that the persons, who, at the time of the establishment of such High Court in any of the said presidencies, are Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewanny Adawlut or Sudder Adawlut of the same presidency, shall be and become Judges of such High Court without further appointment for that purpose, and the Chief Justice of such Supreme Court shall become the Chief Justice of such High Court.

Tenure of office of Judges of High Courts.

4. All the Judges of the High Courts established under this Act shall hold their offices during Her Majesty's pleasure. Provided that it shall be lawful for any Judge of a High Court to resign such office of Judge to the Governor-General of India in Council, or Governor in Council of the presidency in which such High Court is established.

Precedence of Judges of High Courts.

5. The Chief Justice of any such High Court shall have rank and precedence before the other Judges of the same Court; and such of the other Judges of such Court, as on its establishment shall have been transferred thereto from the Supreme Court, shall have rank and precedence before the Judges of the High Court not transferred from the Supreme Court, and, except as aforesaid, all the Judges of each High Court shall have rank and precedence accord-

ing to the seniority of their appointments, unless otherwise provided in their patents.

Salaries, &c., of Judges of the High Courts.

6. Any Chief Justice or Judge transferred to any High Court from the Supreme Court shall receive the like salary, and be entitled to the like retiring pension and advantage, as he would have been entitled to, for and in respect of service in the Supreme Court, if such Court had been continued, his service in the High Court being reckoned as service in the Supreme Court; and, except as aforesaid, it shall be lawful for the Secretary of State in Council of India to fix the salaries, allowances, furloughs, retiring pensions, and (where necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts under this Act, and from time to time to alter the same. Provided always that such alteration shall not affect the salary of any Judge appointed prior to the date thereof.

Provision for vacancy of the office of Chief Justice or other Judge.

7. Upon the happening of a vacancy in the office of Chief Justice, and during any absence of a Chief Justice, the Governor-General in Council, or Governor in Council, as the case may be, shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court, until some person has been appointed by Her Majesty to the office of Chief Justice of the same Court, and has entered on the discharge of the duties of such office, or until the Chief Justice has returned from such absence; and, upon the happening of a vacancy in the office of any other Judge of any such High Court, and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice, it shall be lawful for the Governor-General in Council, or Governor in Council, as the case may be, to appoint a person, with such qualifications as are required in persons to be appointed to the High Court, to act as a Judge of the said High Court; and the person so appointed shall be authorised to sit in and to perform the duties of a Judge of the said Court, until some person has been appointed by Her Majesty to the office of Judge of the same Court, and has entered on the discharge of the duties of such office, or until the absent

Judge has returned from such absence, or until the Governor-General in Council, or Governor in Council, as aforesaid, shall see cause to cancel the appointment of such acting Judge.

Abolition of Supreme Courts and Sudder Courts.

8. Upon the establishment of such High Court as aforesaid in the presidency of Fort William in Bengal, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Nizamut Adawlut at Calcutta in the same presidency shall be abolished:

And upon the establishment of such High Court in the presidency of Madras, the Supreme Court and the Court of Sudder Adawlut and Foujdarry Adawlut in the same presidency shall be abolished:

And upon the establishment of such High Court in the presidency of Bombay, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Foujdarry Adawlut in the same presidency shall be abolished:

And the records and documents of the several Courts, so abolished in each presidency, shall become and be records and documents of the High Court established in the same presidency.

Jurisdiction and powers of High Courts.

9. Each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the presidency for which it is established, as Her Majesty may by such letters patent as aforesaid grant and direct, subject, however, to such directions and limitations, as to the exercise of original civil and criminal jurisdiction beyond the limits of the presidency towns as may be prescribed thereby; and, save as by such letters patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction, and every power and authority whatsoever, in any manner vested in any of the Courts in the same Presidency, abolished under this Act, at the time of the abolition of such last mentioned Courts.

High Courts to exercise same jurisdiction as Supreme Courts.

10. Until the Crown shall otherwise provide under the powers of this Act, all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras, and Bombay respectively, over inhabitants of such parts of India as may not be comprised within the local limits of the letters patent, to be issued under this Act establishing High Courts at Fort William, Madras, and Bombay, shall be exercised by such High Courts respectively.

Existing provisions applicable to Supreme Courts to apply to High Courts.

11. Upon the establishment of the said High Courts in the said presidencies respectively, all provisions then in force in India of Acts of Parliament, or of any Orders of Her Majesty in Council, or Charters, or of any Acts of the Legislature of India, which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras, and Bombay respectively, or to the Judges of those Courts, shall be taken to be applicable to the said High Courts, and to the Judges thereof respectively, so far as may be consistent with the provisions of this Act, and the letters patent to be issued in pursuance thereof, and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of India in Council.

Provision as to pending proceedings in abolished Courts.

12. From and after the abolition of the Courts, abolished as aforesaid in any of the said presidencies, the High Court of the same presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof; and such proceedings, and all previous proceedings in the said last mentioned Courts, shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively.

Power to High Courts to provide for exercise of Jurisdiction by single Judges or Division Courts.

13. Subject to any laws or regulations which may be made by the Governor-General in Council, the High Court,

established in any presidency under this Act, may by its own rules provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court, of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice.

Chief Justice to determine what Judges shall sit alone or in the Division Courts.

14. The Chief Justice of each High Court shall from time to time determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid.

High Court to superintend and to frame rules of practice for subordinate Courts.

15. Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction, and shall have power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Courts for which it shall think necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the officers, and also to settle tables of fees to be allowed to the sheriff, attornies, and all clerks and officers of Courts, and from time to time to alter any such rule or form or table; and the rules so made, and the forms so framed, and the tables so settled, shall be used and observed in the said Courts. Provided that such general rules, and forms, and tables, be not inconsistent with the provisions of any law in force, and shall, before they are issued, have received the sanction, in the presidency of Fort William, of the Governor-General in Council, and, in Madras or Bombay, of the Governor in Council of the respective presidencies.

Her Majesty may establish a High Court in the North Western Provinces.

16. It shall be lawful for Her Majesty, if at any time hereafter Her Majesty see fit so to do, by letters patent under the great seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and of such number of other Judges, with such qualifications as are required in persons to be appointed to the High Courts established at the presidencies hereinbefore mentioned, as Her Majesty from time to time may think fit and appoint; and it shall be lawful for Her Majesty by such letters patent to confer on such Court any such jurisdiction, powers, and authority as under this Act is authorised to be conferred on, or will become vested in, the High Court to be established in any presidency hereinbefore mentioned; and subject to the directions of such letters patent, all the provisions of this Act, having reference to the High Court established in any such presidency, and to the Chief Justice and other Judges of such Court, and to the Governor-General, or Governor of the presidency in which such High Court is established, shall, as far as circumstances may permit, be applicable to the High Court established in the said territories, and to the Chief Justice and other Judges thereof, and to the person administering the government of the said territories.

Other or supplemental charters may be granted within three years after establishment of a Court.

17. It shall be lawful for Her Majesty, if Her Majesty shall so think fit, at any time within three years after the establishment of any High Court under this Act, by Her letters patent to revoke all or such parts or provisions, as Her Majesty may think fit, of the letters patent by which such Court was established, and to grant and make such other powers and provisions as Her Majesty may think fit, and as might have been granted or made by such first letters patent, or, without any such revocation as aforesaid, by like letters patent to grant and make any additional or supplementary powers and provisions, which might have been granted or made in the first instance.

Territorial limits of jurisdiction of Courts may be altered by order in Council.

18. It shall be lawful for Her Majesty, from time to time, by Her Order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under this Act, and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts, as to Her Majesty, with the advice of Her Privy Council, may seem meet.

Interpretation of terms.

19. The word "barrister" in this Act shall be deemed to include barristers of England or Ireland, or members of the Faculty of Advocates in Scotland; and the words "Governor-General" and "Governor" shall comprehend the officers administering the government.

Letters Patent

CHARTER

OF

THE HIGH COURT OF JUDICATURE

IN

BENGAL.

Recital of Statute 24 *and* 25 *Victoria, chapter* 104.

WHEREAS, by an Act of Parliament passed in the twenty-fourth and twenty-fifth years of our reign, intituled "An Act for establishing High Courts of Judicature in India," it was, amongst other things, enacted that it should be lawful for Her Majesty, by letters patent under the great seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal division of the Presidency of Fort William aforesaid, and that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who should be selected from among persons qualified as in the said Act is declared,—Provided always, that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature, and permanent Judges of the Court of Sudder Dewanny Adawlut or Sudder Adawlut of the same presidency, should be and become Judges of such High Court without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court; and that, upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Nizamut Adawlut at Calcutta, in the said presidency, should be abolished:

And that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and

matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the said presidency as Her Majesty might, by such letters patent as aforesaid, grant and direct, subject, however, to such directions and limitations, as to the exercise of original civil and criminal jurisdiction beyond the limits of the presidency town, as might be prescribed thereby; and, save as by such letters patent might be otherwise directed, and subject and without prejudice to the legislative powers, in relation to the matters aforesaid, of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever, in any manner vested in any of the Courts in the same presidency, abolished under the said Act, at the time of the abolition of such last mentioned Courts:

Establishment of High Court at Fort William.

1. Now know ye that we, upon full consideration of the premises, and of our especial grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents we do, accordingly, for us, our heirs and successors, erect and establish, at Fort William in Bengal, for the Bengal division of the presidency of Fort William aforesaid, a High Court of Judicature, which shall be called the High Court of Judicature at Fort William in Bengal, and we do hereby constitute the said Court to be a Court of Record.

"Erect and establish a High Court of Judicature." According to Section 1 of the statute, under which this Charter has been issued, the High Court "shall be deemed to be established from and after the publication of the (letters patent) Charter in the presidency;" and according to Section 8, "upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Nizamut* Adawlut shall be *(ipso facto)* abolished."

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* The word *sudder* means *chief*, and is applicable to the highest Civil Court in the presidency, but not to the highest Criminal Court therein. Every Civil Court in the districts being termed a *Dewanny* Adawlut, (from *dewan*, the administrator or controller of civil affairs under the Government, the Chancellor of the Exchequer, so to speak,) the principal civil (appellate) Court at the presidency was appropriately termed the Sudder Dewanny Adawlut, (Chief Civil Court). The *nizam* was the governor of a province, who had the command of the *fouj* (troops) and, as the conservator of the peace within his territory, exercised criminal jurisdiction and had the power of life and death. The district tribunals of criminal justice were termed *Foujdaree* Adawlut, (literally, Court *Martial*,) but the chief tribunal of the kind, under the immediate control of the Nizam, was called in the Bombay Presidency the Sudder Foujdaree Adawlut and in this, the Nizamut Adawlut, (Royal Court,) to which the adjunct of Sudder is quite inapplicable. The word *Nizamut* is often used to signify *Government*. Hence Sudder Nizamut Adawlut is as absurd as it would be to

"For the Bengal division of the presidency of Fort William." The territorial limit of the High Court is to be conterminous with the territory subject to the Lieutenant-Governor of Bengal, including the non-regulation provinces of Hazareebagh, Assam, Arracan, &c., which had been subject to the control of the Sudder Court at Calcutta. The criminal power over Europeans throughout the presidency of Fort William, including the N. W. Provinces and the Punjab, &c., possessed by the Supreme Court, will be exercised by the High Court.

Constitution and first Judges of the High Court.

2. And we do hereby appoint and ordain that the said High Court of Judicature at Fort William in Bengal shall, until further or other provision shall be made by us or our heirs and successors in that behalf, in accordance with the recited Act, consist of a Chief Justice and thirteen Judges, the first Chief Justice being Sir Barnes Peacock, Knight, and seven of the Judges being Sir Charles Robert Mitchel Jackson, Knight, Sir Mordaunt Lawson Wells, Knight, Henry Thomas Raikes, Esq., Charles Binny Trevor, Esq., George Loch, Esq., Henry Vincent Bayley, Esq., and Charles Steer, Esq., according to the appointments made by the said Act; and we do hereby constitute and appoint John Paxton Norman, Esq., Walter Morgan, Esq., Francis Baring Kemp, Esq., Walter Scott Seton-Karr, Esq., and Louis Stuart Jackson, Esq., being respectively qualified, as in the said Act is declared, to be Judges of the said High Court.

Declaration to be made by Judges.

3. And we do hereby ordain that the Chief Justice and every Judge of the said High Court of Judicature at Fort William in Bengal, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it:—

"I, *A. B.*, appointed Chief Justice [*or* a Judge] of the High Court of Judicature at Fort William in Bengal, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge, and judgment."

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say "Government Royal Court." It is remarkable that no Bengal Civilian would assist Sir Charles Wood, by pointing out to him, in this case, the proper use of the terms, and, in other cases, the actual state of things, which he had to deal with in this Charter and his despatch respecting it.

The oath is neither comprehensive nor of a stringent character, and may as well have been omitted, seeing that it has been held that an oath is not necessary to enable a judge to exercise judicial functions.

4. And we do hereby grant, ordain, and appoint that the said High Court of Judicature at Fort William in Bengal shall have and use, as occasion may require, a seal bearing a device and impression of our royal arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Fort William in Bengal." And we do further grant, ordain, and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of Section 7 of the recited Act; and we do further grant, ordain, and appoint that, whensoever it shall happen that the office of Chief Justice, or of the Judge to whom the custody of the said seal shall be committed, shall be vacant, the said High Court shall be and is hereby authorised and empowered to demand, seize, and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her, or their possession.

Writs, &c., to issue in name of the Crown, and under Seal.

5. And we do hereby further grant, ordain, and appoint, that all writs, summons, precepts, rules, orders, and other mandatory processes to be used, issued, or awarded by the said High Court of Judicature at Fort William in Bengal, shall run and be in the name and style of us, or of our heirs and successors, and shall be sealed with the seal of the said High Court.

Appointment of Officers.

6. And we do hereby authorise and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal, from time to time as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice, and the due execution of all the powers and

authorities granted and committed to the said High Court by these our letters patent. And we do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Governor-General in Council, and shall be either confirmed or disallowed by the Governor-General in Council. And it is our further will and pleasure, and we do hereby, for us, our heirs and successors, give, grant, direct, and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time, appoint for each office and place respectively, and as the Governor-General in Council shall approve of: Provided always, and it is our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they shall hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave, in accordance with the said Rules.

Admission of Advocates, Vakeels, and Attornies.

Powers of High Court in admitting Advocates, Vakeels, and Attornies.

7. And we do hereby authorise and empower the said High Court of Judicature at Fort William in Bengal to approve, admit, and enrol such and so many Advocates as to the said High Court shall seem meet, who shall be and are hereby authorised to appear and plead for the suitors of the said High Court, subject to the rules and directions of such Court.

The Advocates (barristers) may plead in all Divisions of the High Court, and may also under Section 386*a* of the Code of Civil Procedure, act as pleaders (vakeels) in the case of appeals and criminal trials from the Mofussil Courts, and thus, as in America, unite in their persons the functions of attorney (mooktyar) and barrister (vakeel).

8. And we do further authorise and empower the said High Court of Judicature at Fort William in Bengal to approve, admit, and enrol such and so many Vakeels as to the said High Court shall seem meet, who shall be and are hereby authorised to appear, plead, and act for the

suitors of the said High Court, subject to the rules and directions of such Court.

The Vakeels (pleaders) may act and plead, as heretofore, in all appeals and criminal trials from the Mofussil Courts, but not in cases which are governed by the English law.

9. And we do further authorise and empower the said High Court of Judicature at Fort William in Bengal to approve, admit, and enrol such and so many Attornies-at-law as to the said High Court shall seem meet, who shall be and are hereby authorised to appear and act for the suitors of the said High Court, subject to the rules and directions of such Court.

The Attornies may act in the Civil and Criminal Divisions of the High Court, for Calcutta, and in appeals from suits decided in both the original Civil Jurisdictions of the High Court, and act and plead in the Insolvent Court; but they cannot plead as vakeels (pleaders) in the High Court unless they have enrolled themselves as such.

In making rules for the qualifications, &c., of Advocates, Vakeels, and Attornies.

10. And we do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels, and Attornies-at-law of the said High Court, and shall be empowered to remove, on reasonable cause, the said Advocates, Vakeels, or Attornies-at-law; and no person whatsoever but such Advocates or Vakeels shall be allowed to plead for, or on behalf of, any suitor in the said High Court, and no person or persons whatever but such Vakeels or Attornies-at-law shall be allowed to act for any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf, or on behalf of a co-suitor.

"No persons whatever but such vakeels or attornies-at-law shall be allowed to act for any suitor in the said High Court." This rule does not prevent barristers from acting in the manner abovementioned, as it was passed without reference to or in ignorance of the rule established by the Local Legislature, in amendment of the Code of Civil Procedure, (see Section 386 *a*.) If the words are to be construed without reference to the facts, then it may be contended that vakeels can act for suitors in cases arising out of the original civil and criminal jurisdiction of the High Court with regard to Calcutta.

Civil Jurisdiction of the High Court.

Local limits of the ordinary original jurisdiction of the High Court.

11. And we do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may, from time to time, be declared and prescribed by any law or regulation made by the Governor-General in Council, and, until some local limits shall be so declared and prescribed, within the limits declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Governor-General in Council, on the tenth day of September in the year of our Lord one thousand seven hundred and ninety-four; and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits, for the time being declared and prescribed as the local limits of such jurisdiction.

Original jurisdiction as to suits.

12. And we do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immovable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within the local limits of the ordinary original jurisdiction of the said High Court; except that it shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property, sued for, does not exceed one hundred Rupees.

The constructive jurisdiction of the Supreme Court over natives residing beyond the limits of its local jurisdiction, Sir Charles Wood observes, is not vested in the High Court, but in lieu, that Court has power over "every description of cases over which the Mofussil Courts have jurisdiction." The High Court are to have concurrent jurisdiction with the Small Cause Court in Calcutta,* in suits for an amount exceeding 100 rupees, which is not likely to be much acted upon.

* In modification of the rule in Section 101, Act IX. of 1850, regarding the Small Cause Court in Calcutta.

Extraordinary original Civil jurisdiction.

13. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

The trial, in the High Court, of original suits, between persons residing in the Mofussil, "on the agreement of the parties to that effect," will no doubt be often preferred, where there is mistrust as to the competency of the Native or European Judges of the district Courts, and especially where the aid of more qualified counsel than is to be found there may be desired. But such trial can only take place with the consent of the Judges of the High Court, who will not very readily yield to propositions of the kind, as tending to depreciate the district Courts and augment their own labours. The enlargement of jurisdiction has been regarded as a criterion of a good Judge, and the Privy Council has been far from showing a disposition to restrict the admission of appeals to its tribunal from India and the colonies. A different policy prevails here, as is seen in the multiplied restrictions to the hearing of appeals, particularly special appeals.

The object of this provision, as stated by Sir Charles Wood, is to obviate "the compulsory institution, in a Zillah Court, of a suit which, but for the change in the system, might have been instituted in the Supreme Court.

"Without the Bengal division of the presidency of Fort William." These words are explained by Sir Charles Wood to allude to "the province of Assam and others, which are not properly parts of the presidency."

Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.

14. And we do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment, in all cases of original civil jurisdiction, of one or more Judges of the said High Court, or of any Division Court pursuant to Section 13 of the said recited Act: Provided always that no such appeal shall lie to the High Court as aforesaid from any such decision made by a majority of the full number of Judges of the said High Court, but that the right of appeal in such case shall be to us, our heirs or successors, in our or their Privy Council, in manner hereinafter provided.

"In all cases of original civil jurisdiction," *i. e.* both the ordinary and extraordinary. This plan is somewhat in conformity to the plan of the Court of Exchequer Chamber in England. There the judgments of each of the Superior Courts are subject to revision, on appeal, by the Judges of the other two sitting collectively. By

this arrangement, the Judges, who were parties to the judgment objected to, do not sit on the re-hearing. It is not evident whether, under the above Section of the Charter, the Judges, whose judgment is supposed to be erroneous, are to sit with their colleagues. In the older Regulations, no Judge could, on being promoted to a higher Court, sit in appeal, with others, from his own decision; but that rule has been departed from. The new practice was undoubtedly objectionable, as it is not to be expected that any Judges will willingly condemn the decision of a colleague.

It is not clear from Section 39, if this appeal to the High Court abolishes the right of appeal to the Privy Council, in suits of the value of 10,000 Rupees and upwards. There is no reason for such a limitation. It is often desirable to have the right of appeal to a tribunal absolutely superior to local influences.

Appeal from Courts in the Provinces.

15. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of appeal from the Civil Courts of the Bengal division of the presidency of Fort William, and from all other Courts, whether within or without the said Bengal division, from which there is now an appeal to the Court of Sudder Dewanny Adawlut at Calcutta, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Dewanny Adawlut, by virtue of any laws or regulations now in force, or shall become subject to appeal to the said High Court by virtue of such laws or regulations, relating to civil procedure, as shall be hereafter made by the Governor-General in Council.

All appeals heretofore preferred to the Sudder Court are to be heard by Divisions of the High Court.

"In such cases as are subject to appeal," *i. e.* all descriptions of cases heretofore appealable.

Jurisdiction as to Infants and Lunatics.

16. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority, with respect to the persons and estates of infants, idiots, and lunatics, whether within or without the Bengal division of the Presidency of Fort William, as that which is now vested in the said Supreme Court at Calcutta.

Provision with respect to the Insolvent Court.

17. And we do further ordain that the Court for the relief of Insolvent debtors at Calcutta shall be held before one of the Judges of the said High Court of Judicature at Fort William in Bengal; and the said High Court, and any such Judge thereof, shall have and exercise, whether within

or without the Bengal division of the presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction, and otherwise, as are constituted by the laws relating to Insolvent debtors in India.

"Without the Bengal division of the Presidency." These words are introduced from excess of caution, lest insolvents in the non-regulation districts should be deprived of the benefit of the Insolvent Act. But the fact is, that no such person can take the benefit of the law without coming down to Calcutta.

Suits arising within the limits of Calcutta are to be subject to the laws, to which they would have been subject if instituted in the Supreme Court.

Law to be administered by the High Court of the Bengal division of the Presidency of Fort William in civil cases.

In the exercise of ordinary original Civil Jurisdiction.

18. We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall (until otherwise provided) be the law or equity which would have been applied by the said Supreme Court at Calcutta to such case if these letters patent had not issued.

In the exercise of extraordinary original Civil Jurisdiction.

19. And we do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case, coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall (until otherwise provided) be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

Original suits arising in the Mofussil, but tried before the High Court in Calcutta, are to be subject to the law of the parties.

In the exercise of appellate Jurisdiction.

20. And we do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal, to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good

conscience shall be the law or equity and rule of good conscience which the Court, in which the proceedings in such case were originally instituted, ought to have applied to such case.

Appeals from decisions of the district and other Courts of Bengal and the non-regulation provinces, are to be tried according to the law applicable to the original suits.

Criminal Jurisdiction.

Ordinary original Criminal Jurisdiction of the High Court.

21. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, and in respect of all persons, beyond such limits, over whom the said Supreme Court at Calcutta now has criminal jurisdiction.

A Division Court of the High Court will try cases committed to the Sessions, whether in Calcutta or from the Mofussil, the persons, in the former instance, being Europeans and Natives, and, in the latter Europeans, who were not amenable to the local Criminal Courts, except when specially made so.

Jurisdiction as to persons.

22. And we do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

The rule in this Section seems to be included in the preceding one.

Extraordinary original Criminal Jurisdiction.

23. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons, residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut at Calcutta, whether within or without the Bengal division of the Presidency of Fort William, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate-General, or by any Magistrate or other officer specially empowered by the Government in that behalf.

It is the object of this Section, as declared by Sir Charles Wood, to empower the High Court to hold criminal Sessions, on extraordinary occasions, in any place in the interior, when it may be considered expedient to supersede the Sessions Judge of the dis-

trict, as was done when Mr. A. Colvin, a Judge of the Sudder Court of the North-Western Provinces, was appointed to try the Nawab of Furruckabad, for having contrived the murder of Mr. S. Fraser, a political functionary. The objection, to which special Courts, and particularly the deputation of judicial officers to hold trials under special circumstances, are liable, is obviated by making a provision in the law, to be applied on emergencies. The special commitment is to be made either by the Advocate General or a Magistrate particulary authorised by the Government. On the whole, the advantage of the rule may be considered to be doubtful. The ordinary tribunals ought always to be adequate to any emergencies, and no extraordinary tribunals should be required, especially when the High Court possesses both the power of revising trials involving capital punishment, and of reviewing the proceedings in all cases, on the appeal of prisoners convicted by the Courts in the interior.

No appeal from High Court exercising original Criminal Jurisdiction. Court may reserve points of law.

24. And we do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal, from any sentence or order passed in any criminal trial before the Courts of original criminal jurisdiction, which may be constituted by one or more Judges of the said High Court; but it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

There is no appeal from sentences of Divisions of the High Court in trials held upon commitments, though judgments in Division Courts of original civil jurisdiction are appealable to the whole Court. The difference, thus made between civil and criminal trials, is striking enough, when the two Sections are placed side by side, and will be more so to those accustomed to Mofussil law, and to the system of appeals, from the lowest criminal Courts to the highest, which characterises it. It did not appear to Sir Charles Wood, to "call for any particular remarks." The omission however, is one for which no justification can be offered. Appeal on appeal is allowed in civil cases, but none in matters affecting life and liberty. An attempt to reform the English system was resisted by the House of Commons, which is not wonderful, considering that prisoners charged with the most serious crimes were for centuries denied the assistance of counsel, and that hundreds of acts, some of which scarcely deserved the name of offences, were punishable by death, years after the Legislature were convinced of the sanguinary character of their criminal law.

High Court to review on certificate of the Advocate-General.

25. And we do further ordain that, on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdic-

tion, and to pass such judgment and sentence as to the said High Court shall seem right.

A plan is laid down for bringing cases under review; but it can be employed only occasionally. It is open to the objection that the Advocate General is constituted the Mentor of the Court.

Appeals from Criminal Courts in the Provinces.

26. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of appeal from the Criminal Courts of the Bengal division of the presidency of Fort William, and from all other Courts, whether within or without the said Bengal division, from which there is now an appeal to the Court of Sudder Nizamut Adawlut at Calcutta, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Nizamut Adawlut, by virtue of any laws or regulations now in force, or shall become subject to appeal to the said High Court, by virtue of such laws or regulations relating to criminal procedure as shall be hereafter made by the Governor-General in Council.

This Section corresponds with Section 15, regarding civil appeals, *q. v.*

Hearing of referred cases and revision of Criminal trials.

27. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Session Judges, or by any other officers authorised to refer cases to the Sudder Nizamut Adawlut, and to revise all such cases tried by any officer or Court possessing Criminal jurisdiction, as are now subject to reference to or revision by the said Court of Sudder Nizamut Adawlut, whether within or without the Bengal division of the presidency of Fort William, or shall become subject to such reference to or revision by the said High Court, by virtue of such laws or regulations relating to criminal procedure as shall be hereafter made by the Governor-General in Council.

This Section authorises the system of referring trials, especially those involving capital punishment or transportation for life or long periods, and revising others that appear questionable, which obtained under the Nizamut Adawlut. The system has been generally condemned by English lawyers, (and was not less condemned by the late Advocate General, afterwards legal member of the Supreme Council,) on the ground of the absurdity of one Judge's taking the evidence, thereby as it were committing the

prisoner for trial, and another Judge's passing sentence thereupon, without seeing and hearing the witnesses or having the power of cross-examining them. It was to be expected that this part of the Mofussil system, derived as it was from the practice of the Mahomedan lawyers and the constitution of the Nizamut of Bengal, would have been altogether set aside, and a system conformable to English law and jurisprudence substituted, particularly after the discontinuance of the practice of employing Moulvees or Cazees, to pronounce opinions on the guilt of the prisoners and declare the punishment to which they were liable.

The retention of this system (temporarily, as there are grounds for supposing) is a proof that as yet there has been no amalgamation of the Supreme and Sudder Court, but merely an annexation, to admit of putting a few barristers among the Judges who composed the latter.

High Court may direct the transfer of a case from one Court to another.

28. And we do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs, in ordinary course, to the jurisdiction of some other officer or Court.

Criminal Law.

Offenders to be punished under Indian Penal Code.

29. And we do further ordain that all persons, brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference, or revision, charged with any offence for which provision is made by Act No. XLV. of 1860, called the "Indian Penal Code," shall be liable to punishment under the said Act, and not otherwise, subject nevertheless to such alterations, modifications, and additions in and to such Code as may have been or may be prescribed by any acts or regulations made by the Governor-General in Council.

The Indian Penal Code was previously applicable to the Supreme Court.

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

Judges may be authorised to sit in any places by way of circuit or special commission.

30. And we do further ordain that, whenever it shall appear to the Governor-General in Council convenient that

the jurisdiction and power by these our letters patent, or by the recited Act, vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the Sudder Dewanny Adawlut or Sudder Nizamut Adawlut at Calcutta, whether within or without the Bengal division of the presidency of Fort William, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, and the Governor-General in Council shall, by his commission for that purpose, authorise and direct any of the Judges of such Court to hold sittings in such place or places accordingly, at or within such times as by such commission may be authorised or directed, the Judge or Judges acting under such commission, in the places and manner therein directed, shall have and exercise the same jurisdiction, power, and authority, as would be had and exercised by a Judge or Judges of the said High Court, as the case may be, in its ordinary place of sitting.

The rule herein contained for the deputation of Judges of the High Court into the interior, applies both to civil and criminal trials. Occasional rather than periodical deputation is intended, as it would appear from the remarks of Sir Charles Wood.

The propriety of Judges of the Sudder making periodical tours into the provinces, not so much for the purpose of holding Courts as of inspecting the operation of the local tribunals, with a view to the correction of errors and the reform of abuses, was some years ago discussed at great length by the Government and the Judges of the Court. The discussion resulted in nothing, which will probably be the fate of the provision of this Section.

Ambulatory justice is attendant both with loss of time in travelling and the expense of conveying the Judges and the Officers of the Court, while parties are liable to the cost (very great in this country) of conveying eminent counsel to the seat of the temporary tribunal. Sir Charles Wood does not hint *how* the scheme is to work, the *modus operandi*. To have indifferent Judges and counsel in the interior towns, with no public opinion and no press or reporters for the press, and good counsel in the capital of the presidency, who are to be now and then transported at great cost to those places, is certainly not that improvement of the administration of justice which the country has so longed for. In theory, the plan of a Judge of the High Court traveling all over the Mofussil to inspect the working of the Courts, &c., promises great benefits; yet, if we may judge from the results of the periodical tours of the Superintendent of Police in the Lower Provinces, (an office finally abolished from a conviction of its inutility,) Sir Charles Wood's anticipations will prove to be altogether visionary.

Admiralty and Vice-Admiralty Jurisdiction.

Civil.

31. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise all such civil and maritime jurisdiction, as may now be exercised by the said Supreme Court as a Court

of Admiralty, or by any Judge of the said Court as Commissary to the Vice-Admiralty Court, and also such jurisdiction, for the trial and adjudication of prize causes and other maritime questions arising in India, as is now vested in any Commissioner or Commissioners appointed by us or our predecessors, under the powers given by an Act passed in the Session of Parliament held in the 39th and 40th years of the reign of His late Majesty King George the Third, "For establishing further regulations for the government of the British territories in India, and the better administration of justice within the same."

Criminal.

32. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise all such Criminal jurisdiction, as may now be exercised by the said Supreme Court as a Court of Admiralty, or by such Commissary to the Vice-Admiralty Court, or by any such Commissioner or Commissioners as aforesaid.

TESTAMENTARY AND INTESTATE JURISDICTION.

Repeal of certain parts of former letters patent as to Ecclesiastical jurisdiction.

33. And we do further ordain that so much of the letters patent, bearing date the twenty-sixth day of March, in the 14th year of the reign of His Majesty King George the Third, in the year of our Lord one thousand seven hundred and seventy-four, as authorises and empowers the Supreme Court to take cognizance of and proceed in causes, suits, and business, in the exercise of ecclesiastical jurisdiction, shall cease and determine, except as hereinafter mentioned.

The 31st, 32nd, and 34th Sections convey to the High Court the jurisdiction heretofore exercised by the Supreme Court.

Testamentary and intestate jurisdiction.

34. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority, as that which may now be exercised by the said Supreme Court, whether within or without the Bengal division of the presidency of Fort William, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods,

chattels, credits, and all other effects whatsoever, of persons dying intestate, whether within or without the said Bengal division.

Matrimonial Jurisdiction.

Matrimonial jurisdiction.

35. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have jurisdiction in matters matrimonial between our subjects professing the Christian religion, and that such jurisdiction shall extend to the local limits within which the Supreme Court now has ecclesiastical jurisdiction: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction, in matters matrimonial, by any Court not established by Royal Charter within the said presidency, lawfully possessed thereof.

This Section, as observed by Sir Charles Wood, gives the High Court the powers and jurisdiction of the English Divorce Court. The provision is a necessary one, although, owing to the high tone of morality which distinguishes the British community in India, the want of it has not hitherto been felt.

Powers of Single Judges and Division Courts.

Single Judges and Division Courts.

36. And we do hereby declare that any function, which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, under the provisions of the thirteenth Section of the aforesaid Act of the 24th and 25th years of our reign.

"Any function," &c., "may be performed by any Judge or Division Court," &c. The meaning of this Section is, perhaps, more clearly expressed in Section 13 of the Charter. It is, that a single Judge, or Division Court consisting of two or more Judges, is invested with the power of the whole Court, in all matters not expressly referred to as disposable by it.

"Any Judge" would imply that one who had not been a barrister might sit upon trials to be governed by English law. Sir Charles Wood's hint, too, that barrister Judges need not sit upon the trial of civil appeals and criminal referred and other trials of the interior, would imply that such Judges are to be employed exclusively in English law cases, which is not likely and was not intended to be acted upon. The language in which the hint is couched, implies an unacquaintance with the practice in the Sudder, dating several years back, of making translations into English of the principal parts of the records in the vernacular languages, that is surprising. Does "the Division Court of Judges trained in the country" allude to native Judges?

Civil Procedure.

Regulation of proceedings.

37. And we do further ordain that the proceedings, in all matters coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its testamentary and intestate jurisdiction, shall be regulated by the rules relating to the granting of probates and letters of administration, contained in the aforesaid letters patent of His Majesty King George the Third, and by such further or other rules in respect thereof as are now in force; and that the proceedings, in all matters coming before the said High Court, in the exercise of its matrimonial jurisdiction, shall be regulated, as nearly as may be, by the rules and proceedings of our Court for divorce and matrimonial causes in England; and that, save as hereinbefore in this clause otherwise provided, the proceedings in civil suits of every description between party and party, brought in the said High Court, shall be regulated by the Code of Civil Procedure prescribed by an Act passed by the Governor-General in Council, and being Act No. VIII. of 1859, and by such further or other enactments of the Governor-General in Council in relation to civil procedure as are now in force: Provided always that the regulation of such proceedings respectively shall be subject to such laws and regulations, as shall be hereafter made by the Governor-General in Council in relation to such proceedings respectively.

The Code of Civil Procedure is to be followed in trials arising within the local limits of the jurisdiction of the Supreme Court. This implies the use of stamps for pleadings, exhibits, &c. This part of the system has been postponed, it is not known for what reason, till the close of the year.

It is singular that a Code, which was prepared with exclusive reference to the Mofussil Courts, and has already undergone two or three revisions immediately after its promulgation, should be considered well adapted to the Supreme Court, and fitted to supersede the English procedure, after it had received from the hands of the ablest Judges all the improvements of which it is susceptible.

Criminal Procedure.

Regulation of proceedings.

38. And we do further ordain that the proceedings, in all criminal cases which shall be brought before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the said Supreme Court now

has jurisdiction, shall be regulated by the procedure and practice now in use in the said Supreme Court; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV. of 1861, or by such further or other enactments of the Governor-General in Council, in relation to criminal procedure, as are now in force: Provided always that the regulation of such proceedings respectively shall be subject to such laws and regulations, as shall be hereafter made by the Governor-General in Council in relation to such proceedings respectively.

The procedure is to be according to English law, in the ordinary Sessions cases and "in all other criminal cases over which the Supreme Court *had* jurisdiction," *i. e.* such as those referred to in Section 32.

"The proceedings in all other criminal cases shall be regulated by the (Indian) Code of Criminal Procedure," *i. e.* those which may be brought under Sections 23 and 30, for the trial of persons who were not subject to the Supreme Court.

The extension of the use of the Code of Civil Procedure to the High Court, cannot excite surprise, when it is seen that the Code of Criminal Procedure, prepared for the Mofussil, is declared to be the model of the proceedings to be held in certain cases within the original criminal jurisdiction of the High Court, *i. e.*, those committed by the Advocate General or special Magistrates for trial. Sir Charles Wood perhaps was not aware that a Code of Criminal Procedure, suited to the Supreme Court, (implying that the local one was not,) was under preparation. The preparation of the Charter in England, without consulting the local authorities and the Judges of the Supreme and Sudder Court, would imply an opinion that he was more competent than they to decide on such subjects, were there not so many expressions in his despatch of his inability to do justice to the subject without the aid of their superior knowledge and local experience.

Appeals to Privy Council.

Power to appeal in Civil cases.

39. And we do further ordain that any person or persons may appeal to us, our heirs or successors, in our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature at Fort William in Bengal, made on appeal, and from any such final judgment, decree, or order, made in the exercise of original jurisdiction by a majority of the full number of Judges of the said High Court as hereinbefore mentioned: Provided, in either case, that the sum or matter at issue is above the amount or value of 10,000 Rupees, or in case such judgment, decree, or order shall involve, directly or indirectly, any claim, demand, or question to or respecting property amounting to or of the value of 10,000 Rupees, or from any other final

judgment, decree, or order made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to us, our heirs or successors, in our or their Privy Council; subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to ourselves in Council from the Courts of the said presidency; except so far as the said existing rules and orders respectively are hereby varied; and subject also to such further rules and orders as we may, with the advice of our Privy Council, hereafter make in that behalf.

The rule as to appeals from the judgments of the Court which will stand in the place of the Sudder, is the one that previously existed. The one established regarding judgments in appeal from the decrees of divisions of the High Court, (as before remarked,) had better have been omitted.

Appeal from interlocutory judgments.

40. And we further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to us, our heirs or successors, in our or their Privy Council, subject to the same rules, regulations, and limitations as are herein expressed respecting appeals from final judgments, decrees, orders, and sentences.

The rule regarding appeals from interlocutory orders has been acted upon heretofore in this country; but its insertion here is judicious.

Appeal in Criminal cases, &c.

41. And we do further ordain that, from any judgment, order, or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment,

order, or sentence, to appeal to us, our heirs or successors, in our or their Privy Council, provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require; subject always to such rules and orders as we may, with the advice of our Privy Council, hereafter make in that behalf.

The privilege of appeal given in the peculiar case mentioned in this Section, may have been withheld, without any apprehension of thereby occasioning inconvenience. Points of law are seldom likely to be reserved. When they are disposed of according to the opinion of the majority of the High Court, (supposing *it* not to consist of Judges unfamiliar with English law,) it would not be too much to suppose such opinion to be correct, and an appeal to the Privy Council of little or no importance.

There is a remarkable inconsistency between the provisions of this and Section 14. From the judgments of a Division of the High Court in original civil trials, there is an appeal to the full Court, but none from the sentences passed in original criminal trials.

From the decisions of the full High Court in appeal from the judgments of a Division Court exercising original civil jurisdiction, there is no appeal to the Privy Council; but there is one from the opinion of the full High Court on any reserved point arising out of a criminal trial.

It is not to be assumed that Sir Charles Wood had not the strongest reasons for pursuing diametrically opposite courses in two branches of the law; but it is to be regretted that he did not state his reasons, as he has done regarding other parts of the Charter.

Rule as to transmission of copies of evidence and other documents.

42. And we do further ordain that, in all cases of appeal, made from any judgment, order, sentence, or decree of the said High Court of Judicature at Fort William in Bengal, to us, our heirs or successors, in our or their Privy Council, such High Court shall certify and transmit to us, our heirs or successors, in our or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees, and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court; and that the said High Court shall also certify and transmit to us, our heirs or successors, in our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And we do further ordain that the said High Court shall, in all cases of appeal to us, our heirs or successors, conform to and execute, or cause to be executed, such judgments

and orders as we, our heirs or successors, in our or their Privy Council, shall think fit to make in the premises, in such manner as any original judgment, decree, or decretal order, or other order or rule of the said High Court, should or might have been executed.

CALL FOR RECORDS, &c., BY THE GOVERNMENT.

High Court to comply with requisitions from Government for records, &c.

43. And it is our further will and pleasure that the said High Court of Judicature at Fort William in Bengal shall comply with such requisitions as may be made by the Government for records, returns, and statements, in such form and manner as such Government may deem proper.

Provisions of former letters patent, inconsistent with the Act 24 and 25 Victoria, chapter 104, and with these letters patent, to be void on the establishment of the High Court.

44. And it is our further will and pleasure that, from and after the establishment of the said High Court of Judicature at Fort William in Bengal, so much of the aforesaid letters patent granted by His Majesty King George the Third, as is inconsistent with the recited Act and with these letters patent, shall cease, determine, and be utterly void to all intents and purposes whatsoever.

IN WITNESS whereof we have caused these our letters to be made patent. Witness ourself at Westminster, the fourteenth day of May in the twenty-fifth year of our reign.

THE DESPATCH

OF THE

SECRETARY OF STATE FOR INDIA TO THE GOVERNOR-GENERAL OF INDIA IN COUNCIL, REGARDING THE HIGH COURTS.

India Office, London, 14th May, 1862.

To His Excellency the Right Honorable the Governor-General of India in Council.

My Lord,—I herewith transmit to you the letters patent or Charter, under the royal sign manual, for the High Court of Judicature to be established in Bengal, in accordance with the provisions of the Act 24 & 25 Victoria, cap. 104, for establishing High Courts of Judicature in India, and request that you will take immediate measures for instituting the Court, the first Judges of which, including those appointed under the 3rd Section of the Act, are designated in the 2nd Clause of the Charter. Those appointed by the Crown will be severally informed by me of their appointments to the Court.

2. This Charter will accomplish the great object, which has so long been contemplated, of substituting, for the Supreme and Sudder Court abolished by the Act, one High Court of Judicature, possessing the combined powers and authorities of the abolished Courts, and exercising jurisdiction, both over the Provinces under the Sudder Court, and over the presidency town which forms the local jurisdiction of the Supreme Court.

3. Before I review the provisions in detail, it is necessary that I should direct your attention to the general scope and main provisions of the Act in question.

4. It abolishes, in the first place, (as soon as the Charter shall issue,) the Supreme Court and the Court of Sudder Dewanny Adawlut. It vests in the High Court (by the last provision of Section 9) the powers and authorities of those Courts respectively, except so far as the Crown may by such Charter otherwise direct. And (by the first part of the same Section) it invests the High Court with such civil, criminal, admiralty, vice-admiralty, testamentary, intestate, and

matrimonial jurisdiction, and all such powers and authority in relation to the administration of justice in the presidency, as the same Charter may confer. With respect, therefore, to the fusion of the Supreme and Sudder Court, it appears obvious that the Act itself speaks, and that to assume and effect the same purpose by affirmative declaration in the Charter, would be superfluous. It has been consequently deemed unnecessary, that the Charter should exhibit on the face of it an explicit statement of the powers and jurisdiction to be possessed by the new Court in consequence of the fusion, as would have been the proper course if those powers and jurisdiction had been entirely new. Recourse has been had in some places, in lieu of such explicit statement, to reference to statutory provisions, and, in others, to the Charter of the Supreme Court, when the object of clearness appeared to require it. But, wherever the Charter does not otherwise specify, the High Court will use the powers and administer the jurisprudence, appertaining to those Courts respectively to whose authority it now succeeds.

5. But the Charter is intended positively to declare all such civil, criminal, and other jurisdictions above specified, as the Crown thinks proper by this Charter to confer on it, supplementary or additional to its main purpose, namely, the fusion of the aforesaid Courts.

6. Moreover, the words giving authority to confer on the Court such jurisdiction and such powers and authorities for the administration of justice as the Crown may direct, appear very large, and such as, in point of fact, invest the Crown with extensive legislative powers, so far as "the administration of justice" within the meaning of the Section, may require. It has been, however, thought best to use this power very sparingly, and simply as ancillary to the real purpose of the Act, namely, the establishment of new Courts.

7. Another reason for the form which the present letters patent assume, is to be found in the provisions of Section 17 of the Act of last Session. By that Section, power is given to the Crown to recall the letters patent establishing the Court, at any time within three years after its establishment, and to grant other letters patent in their stead. This provision was inserted in the Act, mainly with the view of enabling Her Majesty's Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect Charter, by which the jurisdiction and authority of the Court are to be permanently fixed. On this point, I request you will put yourself in communication with the Judges of the Court, and, at any time previous to the expiration of two years from the date of the establishment of the Court, furnish me with any suggestions they may make or any amendments they may propose in the letters patent now transmitted; and I shall be glad if, in proposing alterations, the Judges will put their recommendations as nearly as possible in the form in which they wish them to appear in the future letters patent.

8. I proceed to notice in order such of the provisions of the Charter as appear to me to call for special remark.

9. By Clause 6, power is given to the Chief Justice to appoint the officers of the Court, and to fix their salaries, subject, however, in both cases, to the approval and confirmation of the Governor-General

in Council. This provision does not refer to the settling of tables of fees, where fees are allowed, which, under Section 15 of the Act, is required to be done by the Court.

10. The Supreme Court exercises an authority entirely independent of the Government in regard to its ministerial officers. The Government, however, has always considered itself at liberty to receive representations from any of the officers of the Sudder or subordinate Courts, who felt themselves aggrieved by the orders of the Judicial authorities, and to express its opinion on the propriety or otherwise of the proceedings of the Courts in such cases. It will be expedient for you to take the question into your consideration, and, after communication with the Court, to adopt some rule in regard to it, which of course must be uniformly applicable to all the officers of the Court. Constituted as the High Court will be, it will merit all the confidence you can repose in it; but, as a question of policy, the extension of the liberty of application to the Government to those, who have not hitherto enjoyed it, appears to me preferable to taking it away from those who have heretofore been permitted to avail themselves of it, as a mode of obtaining redress against proceedings alleged by the applicants to be unjust and oppressive.

11. In regard to the admission of advocates, vakeels, and attornies, the recommendations of the Law Commissioners have been followed. Under the existing practice, the advocate pleads, and the attorney acts for the suitors of the Supreme Court, and the vakeel both pleads and acts for the suitors of the Sudder Court, of which Court the advocate and attorney of the Supreme Court are *ex-officio* vakeels. These terms are employed in the Charter simply to express the functions of these several classes of practitioners. The advocate and attorney will respectively plead and act in the High Court, and the vakeel will both plead and act in the High Court as he did in the Sudder Court. Any person may apply to be admitted either as an advocate or vakeel or attorney under the rules which the Court is authorised by the Charter to make; and there is nothing in the Charter to prevent the admission of advocates and attornies to be also vakeels of the High Court, should the judges consider such a course to be expedient.

12. The provision in the Act, Section 2, Clause 4, which declares that pleaders of the Sudder Court, "who shall have been admitted as pleaders of the High Court," shall be eligible, under certain conditions, to the bench of the Court, implies that a discretionary power may be exercised as to the admission of the present pleaders of the Sudder Court to the bar of the High Court. This enactment will account to you for the omission from the Charter of any provision appointing all the present practitioners of the Supreme and Sudder Court. I conclude, however, that, unless in any special cases there are strong reasons to the contrary, the Court will admit the whole of the practitioners in the abolished Courts, at the date of their abolition, to be the first advocates, vakeels, and attornies of the High Court.

13. With reference to the concluding sentence of Clause 10, it is to be observed that the letters patent contain no provision reserving

to the attornies of the present Supreme Court the right of pleading, after the issue of this Charter, in the Insolvent Court as newly regulated by Clause 17.* No such provision, however, is necessary, as the Insolvent Court is a separate tribunal, not affected by the Act authorising the letters patent, and will continue a separate Court, though, for the future, presided over by a Judge of the High Court. The attornies therefore will, as heretofore, practise in accordance with the rules of the Insolvent Court itself.

14. By the important provisions contained in the Clauses of the Charter 11 to 38 inclusive, effect is given to the 9th Section of the Act, respecting the jurisdiction and powers to be exercised by the High Court.

15. The original civil jurisdiction now exercised by the Supreme Court within the limits of the presidency town will henceforth be exercised, under the Charter, by the High Court, including in that term (Clause 36 of Charter) a Judge or Division Court of the High Court, appointed or constituted under the provisions of the 13th Section of the Act.

16. As it is very desirable that every suit should be instituted in the Court of the district in which the property forming the subject of dispute is situated, or in which the cause of action has its origin, or in which the defendant resides or carries on business, the jurisdiction hitherto exercised by the Supreme Court (on the ground of constructive inhabitancy or otherwise) over persons and property beyond the local limits of the presidency town, but within the limits of the presidency or division subject to the authority of the High Court, has not been vested in the High Court. The concluding provision of Clause 11 provides that the exercise of the ordinary original civil jurisdiction of the Court shall be confined to the local limits of the presidency town, with power, however, to the Court, under Clause 13, to call for and try any suit instituted in any Court subject to its superintendence, when, for reasons to be recorded, it shall think proper to do so.

17. The terms of Clause 12, defining the original jurisdiction of the High Court as to suits, are nearly similar to those employed in Section 5 of the Code of Civil Procedure (Act VIII. of 1859), and are intended to include every description of cases over which the mofussil Courts have jurisdiction. By the 8th Section of the 21st George III., c. 70, the Supreme Court is precluded from exercising any jurisdiction in any matter concerning the revenue. Further, a decision of the Judicial Committee of the Privy Council, pronounced in April 1856, ruled against the exercise of the Ecclesiastical jurisdiction of the Supreme Court in matters matrimonial between others than Christians, and even expressed some hesitation as to whether that Court could administer a remedy in such cases on the civil side. It is one object of the present Charter to do away with all such restrictions and limitations, as far as this can be done without trenching on the proper province of legislation. It has, therefore, been sought to invest the High Court, in the exercise of its original civil jurisdiction, with as ample powers in receiving and determining cases of every description, and in applying a remedy to every wrong, as are exercised by the Courts

* There is *no* new regulation on the subject.

not established by Royal Charter, and thus to place the Courts of first instance in the presidency towns, and in the interior of the country, in this respect, as nearly as may be, on the same footing.

18. I shall be glad to be furnished with your opinion, after consultation with the Judges of the Court, as to the concluding portion of Clause 12, excluding the jurisdiction of the Court in regard to cases falling within the jurisdiction of the Small Cause Court of Calcutta, in which the debt, damage, or value of the property sued for, does not exceed 100 Rupees. Hitherto, I believe, there has been no tendency to bring into the Supreme Court cases cognisable by the Small Cause Court; but should it appear that, under the new system, the time of the High Court is unnecessarily taken up with trying cases which might be instituted in the Small Cause Court, it may become a question for consideration whether the sum excluding the jurisdiction of the High Court might not be raised to, say, 300 or 500 rupees.

19. It has been suggested that the Small Cause Court should be placed on the same footing as a Zillah Court, in its subjection to the High Court as a Court of appeal and general superintendence. But I do not consider that it was the purpose of the Act of Parliament of last Session, that the Crown, in framing a Charter under it for the High Court, should interfere with the present position and jurisdiction of other and independent Courts. This object, if desirable, is properly to be attained by legislation. Should you be of opinion that the Small Cause Court ought to be placed in the same relation to the High Court as any other Court subject to its appellate jurisdiction and general control, the measure can be carried into effect by an Act of the Governor-General in Council.

20. As already observed, the effect of Clause 12 will be to confine the ordinary original civil jurisdiction of the High Court within narrower limits than the civil jurisdiction exercised by the Supreme Court. By Clause 13, however, the High Court is empowered to call for and try, as a Court of first instance, any suit which the law requires to be instituted before some other tribunal. By the exercise of the power thus conferred on it, the High Court will be enabled to obviate all reasonable ground of complaint, when it shall deem that any hardship or injustice is likely to result from the compulsory institution in a Zillah Court of a suit which, but for the change in the system, might have been instituted in the Supreme Court.

21. The introduction of the words "whether within or without" the Bengal division of the presidency of Fort William, in this and in several other clauses, may appear to require explanation. The Court about to be established is called, in Section 2 of the Act 24 and 25 Victoria, cap. 104, a Court "for the Bengal division of the presidency of Fort William." That title is of course preserved in the Charter. By Section 8, the Supreme and Sudder Courts are abolished, and by Section 9 all their jurisdiction, power, and authority, except when otherwise provided, are vested in the High Court. But the Supreme Court has various original jurisdictions, extending over the whole of the presidency of Fort William, and also over some of the non-regulation Provinces under the Government of India; and the Sudder

Court has various appellate jurisdictions, extending over the Bengal division of the presidency, and also over the Province of Assam and others which are not properly parts of the presidency. The result is, that the High Court "for the Bengal division," succeeding to the powers of both Supreme and Sudder Courts, has, in several respects, jurisdiction in territories not within the Bengal division. As this is the result of the Act, it might not have been necessary to notice it in the Charter. But, for the sake of clearness, and in order to show distinctly that the Charter is meant to apply to these extra local jurisdictions, as well as to the strictly local jurisdiction within the Bengal division, it has been deemed advisable to introduce these words.

22. Clauses 14 and 15 give effect to the recommendation of the Law Commissioners, that the High Court shall have all the appellate jurisdiction which is now exercised by the Sudder Dewanny Adawlut, and a new appellate jurisdiction in civil cases from the Courts of original jurisdiction, constituted by one or more of its own Judges, except that, in the case of a decision which has been passed by a majority of the full number of the Judges of the Court, the appeal shall lie to Her Majesty in Council.

23. It will appear, from a subsequent clause in the letters patent, that the proceedings in the High Court in civil cases are to be regulated by the Code of Civil Procedure enacted by the Legislature of India, of which Act XXIII. of 1861 forms a part. By Section 23 of the last mentioned Indian Act, provision has been made for a difference of opinion on the hearing of an appeal. A difficulty, however, may occur when two Judges, constituting a Division Court for the trial of cases in the exercise of original jurisdiction, differ as to the judgment to be given. For such a case, the Code of Civil Procedure, which is adapted to Courts of first instance, presided over by single Judges only, contains no provision.* To call in a third Judge, and to re-try the case, with a view to a judgment from which there may be an appeal to the High Court under Clause 14, would be productive of unnecessary delay and expense to the parties; and I am of opinion that the Court should make provision for such a contingency, by a rule made under the 13th Section of the Act of Parliament, providing either that the judgment shall be in accordance with the opinion of the senior of the Judges constituting the Division Court, or that the final judgment shall be entered *pro formâ*, according to such opinion, such judgment being a judgment for the purpose of an appeal against the same, but not for any other purpose.

24. The substantive civil law to be administered by the High Court within the jurisdiction of the Supreme and Sudder Courts respectively, will, until otherwise provided, continue as at present. This, as I have said, it was no part of the purpose of the Act of Parliament or Charter to affect. And the clauses on which I am now commenting are probably superfluous. But they have been introduced to obviate any apprehension which might have been entertained that, in fusing the

* This is an unaccountable oversight, the Code being intended for courts of appeal of two or more Judges, as observed in one of the sentences immediately preceding this.

two Courts together, it was intended to fuse also the law which they have respectively hitherto administered, and thus to make a substantial innovation not only in the tribunals for administration of the law, but in the law itself. I trust, however, that measures may be taken ere long for effecting great improvements in this respect, by enacting for the British possessions in India a body of substantive law, by which all classes shall be governed and all transactions shall be regulated, except in cases to which our Judicature are required to apply the personal laws of any classes of our Indian subjects.

25. Under Clauses 21, 22, and 38, no change will be effected by the Charter in the administration of criminal justice in the presidency town, or in respect of persons subject to its criminal jurisdiction residing in the interior of the country. It appears, however, to Her Majesty's Government, that some modification of the existing practice, both at the capital and in the provinces, is necessary, and on these points I shall address you in a separate Despatch.

26. The Sudder Court exercises no original jurisdiction.* But by Clause 23, original criminal jurisdiction throughout the territories subject to its authority has been given to the High Court, the principal object being to enable the Judges to hold trials for offences committed out of the presidency town, at which, from their importance, or for other special cause, it may be expedient that a Judge or Judges of the High Court should preside.

27. The remaining clauses of the letters patent on the subject of the criminal jurisdiction of the High Court do not call for any particular notice. They contain no special provisions respecting the transfer to that Court of the criminal jurisdiction exercised by the Supreme Court, over inhabitants of such parts of India as are not comprised within the local limits of the letters patent, that having been fully provided for by Section 10 of the Act, under authority of which the High Court is established.

28. As in the case of the Small Cause Court, you will consult the Judges in regard to the relation in which the High Court is to stand to the Magistrates of Calcutta.

29. Clause 30, respecting the exercise of jurisdiction by the High Court elsewhere than at its ordinary place of sitting, is a very important provision, and one which, I have no doubt, if judiciously carried into effect, will materially tend to the greater efficiency of all the judicatories subject to the superintendence and authority of the Court. Circumstances may frequently arise when the deputation of a Judge or Judges of the High Court would be a measure of the highest expediency. For such cases the clause under consideration will enable the Government to provide, by deputing one or more Judges from the High Court, who would avail themselves of the opportunity thus afforded them of making a searching inquiry into the manner in which the local Courts were performing their duties.

30. With reference to this clause, it has been considered whether the precedent of Section 14 of the Act of Parliament should not be

* It was vested with the power, though probably never exercised.

followed, and the authority to make the necessary arrangements for exercise of the Court's jurisdiction, out of the usual place of sitting, vested in the Chief Justice. On the whole, it was thought that acts partaking so much of an administrative character might be more perfectly performed by the Governor-General in Council. But it is scarcely necessary for me to add, that Her Majesty's Government entertain full confidence that the Chief Justice will be the authority habitually consulted in the matter.

31. The Supreme Court exercises at present admiralty jurisdiction under its Charter. The Chief Justice has vice-admiralty jurisdiction, under the commission of the 9th July 1822; and all or any of the Judges of the Supreme Court may be appointed Commissioners, under the provisions of 39 and 40 George III., cap. 79, sec. 25, for the trial and adjudication of prize causes and other maritime questions arising in India. By the present Charter the whole of these jurisdictions and powers will be vested in the High Court, and as in the Act above cited, the expression "other maritime questions" is general, mention is made of all the jurisdictions conferred as above mentioned, in the clauses of the Charter providing both for the civil and criminal maritime jurisdiction of the High Court.

32. The clauses respecting testamentary and intestate jurisdiction do not call for any remark.

33. Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the presidency in the same position under the High Court, as to "matters matrimonial" in general, as they now are under the Supreme Court; and this they believe to be effected by Clause 35 of the Charter. But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce, which the Supreme Court does not possess, in other words, that the High Court should have the same jurisdiction as the Court for divorce and matrimonial causes in England, established in virtue of the Act 20 and 21 Vict., c. 85, and in regard to which further provisions were made by 22 and 23 Vict., c. 61, and 23 and 24 Vict., c. 144. The Act of Parliament for establishing the High Courts, however, does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act; and some of them, the Crown clearly could not so import, such, for instance, as those which prescribe the period of re-marriage, or those which exempt from punishment clergymen refusing to re-marry adulterers. All these are in truth matters for Indian legislation; and I request that you will immediately take the subject into your consideration, and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court in England, one of the provisions of which should be to give an appeal to the Privy Council, in those cases in which the Divorce Court Act gives an appeal to the House of Lords.

34. The object of the provision at the end of Clause 35 is to obviate any doubt that may possibly arise, as to whether, by vesting the High Court with the powers of the Court for divorce and matrimonial causes in England, it was intended to take away, from the Courts

within the division of the presidency not established by Royal Charter, any jurisdiction which they might have in matters matrimonial, as for instance in a suit for alimony between Armenians or native Christians. With any such jurisdiction it is not intended to interfere.

35. Clause 36 refers to the powers of single Judges and Division Courts, appointed or constituted under the provisions of the 13th Section of the Act. By Section 14 of the Act, the power of determining from time to time what Judge in each case shall sit alone, and what Judges shall constitute Division Courts, is placed in the hands of the Chief Justice. It will be observed, that the law does not require that a Judge selected from the bar shall necessarily form a part of every Division Court; and it will be for the Chief Justice to consider whether, in cases exclusively between Natives,* it will not be desirable to follow, as far as possible, the course which had already been resolved upon [?] in regard to the cases under appeal to the Sudder Court at the time of its abolition, and to constitute the Division Court of Judges trained in the country, whose knowledge of the Native language will obviate the expense and delay of translating the proceedings.

36. Clause 37 is a very important one, and, there is little doubt, will prove a very salutary provision. It has, therefore, been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter. It extends to the High Court the Code of Civil Procedure enacted by the Legislature of India for the Courts not established by Royal Charter, and thus accomplishes the object so long contemplated of substituting one simple Code of Procedure for the various systems (corresponding to its Common Law, Equity, and Admiralty jurisdictions) which have been in operation in the Supreme Court since the date of its establishment.

37. In regard to the rules respecting appeals to the Privy Council, the object has been to avoid unnecessary innovation where so much of change, with its necessary inconvenience, is unavoidable. The existing rules which regulate these appeals are, therefore, left in force, with one or two additions only which experience in the Court of the Judicial Committee has found advisable. For instance Clause 4 is introduced, as it has been commonly introduced of late years in the appeal rules of other dependencies of Great Britain, in order to remove all doubt as to the power of the High Court to allow an appeal to the Council from interlocutory judgments.

38. It will, however, be obvious to you that the rules, as now framed, will be liable to the reproach of confusion and perhaps of uncertainty. They will be compounded of those contained in this Charter and those already in force, which will necessitate reference to several documents. You will agree with me that a simple and intelligible code of rules, to regulate appeals to the Privy Council from the new High Courts, or rather from the High Courts in general which may be constituted under the Act of Parliament, will be of great

* The proceedings are the same, whether the cases be "*exclusively* between Natives" or between Europeans and Natives, being in either case recorded in the vernacular and translated into English for the benefit of the Sudder Judges, notwithstanding their "knowledge of the Native languages."

advantage to the suitors and the public [profession?] I should wish, therefore, that one of the first objects of the Judges, as soon as the amount of labour thrown on them by their new position may allow it, might be to prepare suggestions for such a code of rules, which might then be reduced into a complete shape by the authority of the Privy Council at home.

39. In forwarding the letters patent to the Judges of the High Court, you are requested to furnish them with a copy of this despatch. I trust that the letters patent, taken in connection with the Act for establishing the Court, will be found to contain every thing requisite for enabling the Court to proceed at once to the discharge of its important duties. It is possible that omissions may be discovered by the legal authorities in India, which may impede the proper action of the Court; and should the Judges represent to you that such is the case, you will take immediate steps for supplying what is wanting, by such legislative measures as you may consider most expedient for remedying the defects brought under your consideration.

40. I cannot conclude this despatch without expressing the deep interest felt by Her Majesty's Government in the success of this important measure. The Crown by its letters patent has sanctioned the establishment of a tribunal as the chief Court of Justice in India, which, in the trained learning of the Judges selected from the bar, and in the knowledge of the language, feelings, and habits of the Natives of that country possessed by the other members of the Court, combines the most material elements of success. And Her Majesty's Government look with confidence to the zealous exertions and cordial co-operation of the Judges, to place the administration of justice in India, under the controlling authority of the Government, in such a state of efficiency as will render it, in every respect, adequate to its ends and satisfactory to the people and the Government.

(Signed) C. WOOD.

*** Some of the misconceptions, regarding the constitution and practice of the local Courts, which pervade this despatch, have been cursorily noticed. The writer of it observes that the attornies, equally with the barristers, of the Supreme Court, practised as vakeels in the Sudder Court. Why he should have thought it proper to curtail the privileges of the attornies, who are, to say the least, not inferior to the vakeels, by allowing *them* to act only in appeals and other cases from the district Courts, while vakeels are allowed to plead as well as act in such appeals, is inexplicable.

He says indeed that "there is nothing in the Charter to prevent the admission of advocates and attornies to be also vakeels of the High Court," (a means of *fusion?)* but he gives no reasons why they, who were "*ex-officio* vakeels in the Sudder Court," should cease to be such under the High Court? Perhaps his recondite meaning is that, as pleaders of the Sudder Court, "admitted as pleaders of the High Court," are eligible to the bench of that Court, and attornies not, such attornies as wish to be so should qualify themselves, by becoming "also vakeels of the High Court." But as advocates are already eligible, why has he placed them in the same category with attornies?

COMMENTS

ON THE

CODE OF CIVIL PROCEDURE,

ACT VIII. OF 1859,*

(MODIFIED BY ACT XXIII. OF 1861.†)

An Act for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter.

Preamble.

WHEREAS it is expedient to simplify the Procedure of the Courts of Civil Judicature not established by Royal Charter; it is enacted as follows.

THIS Act was not intended to apply to the Supreme Courts of Calcutta, Madras, and Bombay, which were established by Royal Charters under the provisions of the Statute 13 George III., Chap. 63, and to the Small Cause Courts established in those places by Act IX. of 1850. Those Courts have, however, been abolished, together with the Sudder Courts, on the establishment, by the Royal Charter issued on the 14th May, 1862, under the authority of the Statute 24 and 25 Victoria, Chap. 104, of High Courts of Judicature, which are to "have and exercise all jurisdiction, and every power and authority whatsoever, in any manner vested in the Courts abolished, at the time of their abolition."

The High Courts established are, under Section 9, of the Act of Parliament cited, to "have and exercise civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate."

* This Act received the assent of the Governor-General, on the 22nd March, 1859, to come into operation on the dates mentioned in Section 387.

† This Act received the assent of the Governor-General, on the 28th August, 1861. As it is to be read and taken as part of Act VIII. of 1859, its Sections have been introduced into those places in the Code to which they severally appertain, or for which they are substituted.

Under Section 37 of the Charter, "the proceedings in all matters coming before them, in the exercise of their testamentary and intestate jurisdiction," are to be "regulated by the rules relating to the granting of probates and letters of administration contained" in the Charter of the Supreme Court, and by such further or other rules in respect thereof as were since in force; those regarding "matrimonial jurisdiction" by the "rules and proceedings, as nearly as may be," of the "Court for divorce and matrimonial causes in England;" and those in "civil suits of every (other) description, between party and party," by this Code of Civil Procedure and such subsequent enactments "in relation to civil procedure as are now in force."

Every High Court is, by Section 13 of the Statute, authorised to "provide by its own rules for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges, of its original and appellate jurisdiction."

The Division Courts, to be constituted under Section 14, by the Chief Justice, are to take up respectively, besides other matters, the appeals which heretofore lay to the Sudder Courts, (Section 15 of the Charter,) and the suits instituted in the Supreme Courts, (Section 12, idem,) and to dispose of them according to the laws applicable to them severally, (Sections 18 and 20, idem,) observing the rules and procedure prescribed by this Code.

Thus regular and special appeals from the decisions of the district Judges and Principal Sudder Ameens, and special appeals from the decisions in appeal of the district Judges in cases under Act X. of 1859, are to be tried, as heretofore, agreeably to this Code. Original civil suits too, that were triable in the Supreme Court, will be tried agreeably to this Code, and the pleadings therein, &c., will necessarily be engrossed on stampt paper, according to the provisions of the stamp law. Appeals from the decisions of the Division Courts in these original suits will be heard by the High Court, under the rules in this Code applicable to appeals. But it is not clear, from Section 39 of the Charter, *q. v.* whether the decisions of the High Court in such appeals are final, or appealable to the Privy Council, like those on appeals from the District Courts.

The exceptions to the general use of this Code are contained in Sections 383—385.

CHAPTER I.

OF THE JURISDICTION OF THE CIVIL COURTS.

SECTION 1.

Civil Courts have cognisance of all suits unless specially barred.

The Civil Courts shall take cognisance of all suits of a civil nature with the exception of suits of which their cognisance is barred by any Act of Parliament, or by any Regulation of the Codes of Bengal, Madras, and Bombay respectively, or by any Act of the Governor-General of India in Council.

This Section comprises matters cognisable by the Civil Courts. By the use of the words "suits of a civil nature," the Code avoids the details given in the Regulations, and it is thereby intended to include all suits of a civil nature. The provision for exemption is generally given, so as to include exemptions already made, or which may hereafter be made, by any Acts of Parliament, Regulations, or Acts. For instance, all causes of action in matters of a criminal nature are excepted by the Regulations: actions thereon will not, therefore, lie in the Civil Courts under this Code.

A class of cases, usually considered to be comprised within the jurisdiction of the Civil Courts, has been transferred to the Collectors of Revenue and their Deputies,* by Act X. of 1859, which came into operation on the 1st August of that year. That law defines the rights of the agricultural classes, the period in which their suits shall be instituted before the Collectors or their Deputies, the manner in which these shall be tried and to what authorities appeals from their orders and decisions shall be preferred, *i. e.* the Commissioners of Revenue and the district Judges respectively, together with the rules of distraint and sale.

Those Sections of the Rents Law, which refer to the description of cases cognisable exclusively by the Collectors or the Judges and the cases in which appeals lie to the district Judges and not the Commissioners, are noted in the Appendix, and abstracts of the constructions already put on them, given, as particularly meriting the attention of judicial officers.

Another class of cases has been withdrawn from the jurisdiction of Civil Courts, by the establishment of Small

* Act XII. of 1861, (Section 3,) authorises the Local Government to "empower any Judge of a Small Cause Court to hear and determine, under the rules" in Act X. 1859, "applicable to trials before a Collector, and subject to the same regular and special appeal, the claims cognisable under that Act, arising within the local limits of the jurisdiction of such Court. Any Judge so empowered shall exercise all the powers of a Collector under that Act, except the power of hearing appeals." Moonsiffs also may be appointed Deputy Collectors for the special purpose of trying suits under Act X. of 1859.

Cause Courts, at considerable places in the Mofussil, under Act XLII. of 1860.

The amount or value of the suits is not to exceed five hundred rupees. The suit may be for money due, whether on bond or other contract, or on a partnership account, where a balance has been struck by the parties or their agents, or for rent not cognisable under Act X. of 1859, (suits for which must be instituted in the Revenue Courts above noticed,) or for personal property, or the value thereof, or for damages, not being damages for personal injury from which no pecuniary loss has been sustained.

From decrees in suits of these descriptions there is no appeal, but it is left to the discretion of the Judges of the Small Cause Courts to obtain the opinion of the Judges of the High Court,* on any points of law regarding which they entertain reasonable doubts. From decrees in suits of these descriptions, passed by Judges of other than the Small Cause Courts, appeals lie to the District Judges; but the decisions thereon are not subject to special appeal to the High Court, (Act XLIII. of 1860). The appellate Courts are, however, authorised, in the same manner as the Judges of the Small Cause Courts, to apply for the opinion of the High Court.

A class of cases, on which the Collectors of Revenue were required to report, and which therefore were allowed to be instituted before them also, have, by Act VII. of 1862, of the Bengal Government, (which is inserted in the Appendix,) been placed within the exclusive jurisdiction of the Civil Courts, to be tried under the rules of this Code.

The Calcutta Sudder Court ruled, 22nd May, 1860, that suits regarding the forcible taking of kuboolyuts, like those for the forcible taking of any other deeds, are not among those contemplated by Act X. of 1859, and must consequently be preferred in the Civil Courts. See Section 121.

SECTION 2.

Civil Courts not to take cognisance of suits previously heard and determined.

The Civil Courts shall not take cognisance of any suit, brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties or between parties under whom they claim.

This is a re-enactment of Section 16, Regulation III. of 1793 of the Bengal Code, and the corresponding provisions in the laws of the other Presidencies.

* This term must be substituted for "Sudder Court," *passim* in this Code and the comments thereon.

"Between parties under whom they claim" refers to such parties as succeed to the rights of the parties to the first suit, by inheritance, purchase, gift, or other mode of transfer. To bring a case within the meaning of this Section, it is necessary that the parties and the cause of action in the two suits should be the same, and that such cause of action should have been directly decided.

SECTION 3.

Revision of judgments of the Civil Courts.

The judgment of the Civil Courts shall not be subject to revision otherwise than by those Courts, under the rules contained in this Act applicable to reviews of judgment, and by the constituted Courts of Appellate Jurisdiction.

This is a negative way of signifying that the decree of a competent Court in a regular suit cannot be set aside, except by another judgment of that Court in review, or by the judgment of a Court of appeal. See Chapters VIII. and XI.

SECTION 4.

No person excepted from jurisdiction by reason of place of birth or of descent.

No person whatever shall, by reason of place of birth or by reason of descent, be in any Civil proceeding whatever excepted from the jurisdiction of any of the Civil Courts.

This is the law as it stood before the passing of this Act. All persons are amenable to the jurisdiction of the Civil Courts, irrespective of race and country.

SECTION 5.

Jurisdiction of Civil Courts.

Subject to such pecuniary or other limitations as are or shall be prescribed by any law for the time being in force, the Civil Courts of each grade shall receive, try, and determine all suits hereby declared to be cognisable by those Courts, if, in the case of suits for land or other immovable property, such land or property shall be situate within the limits to which their respective jurisdictions may extend, and, in all other cases, if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell or personally work for gain, within such limits.

The limitations mentioned in this Section have reference mainly to the jurisdiction of the Courts, arising out of the valuation of suits and territorial limits of those Courts. The alterations of jurisdiction effected by the establishment of Revenue and Small Cause Courts have been specified in the remarks under Section 1. Since the establishment of the High Court, by the union of the jurisdictions of the Supreme and Sudder Court, all appeals from the decrees of the Dis-

trict Courts are to be tried by a Division of the High Court, according to the laws heretofore applicable to them, and all original suits arising within the limits of Calcutta are to be tried by another Division of it, according to the laws which heretofore governed such suits, while appeals from the decrees passed in such original suits may be heard by the High Court at large. The provisions of this Code are applicable both to the original suits arising in the districts, and those in Calcutta, and to the appeals from the decrees passed thereon. It is competent to the High Court (under Section 13 of its Charter) to remove before itself any original suit instituted before any lower Court, whether within the regulation or non-regulation districts. The object of this provision is stated (para. 20 of the despatch of the Secretary of State for India) to be to obviate "any hardship or injustice likely to result from the compulsory institution in a Zillah Court of a suit, which, but for the change in the system, might have been instituted in the Supreme Court."

"Cases falling within the jurisdiction of the Small Cause Courts at Calcutta, in which the debt, or damage, or value of the property sued for does not exceed one hundred rupees," are not within the "ordinary original jurisdiction of the High Court," (Section 12 of the Charter). It were desirable that the Mofussil Courts of those places, in which Small Cause Courts have been established, possessed similar concurrent jurisdiction, to allow suitors at their option to resort to such Courts.

Limitation of time and other limitations do not properly come under this Section, as the suits must be first instituted to make them applicable,—unless they be patent on the face of the plaint, as provided in Section 32.

The jurisdiction of the Civil Courts over suits remains very much the same as before; the only addition being that all suits, except for land or immovable property, may be tried by the Court within the limits of whose jurisdiction the defendant personally works for gain at the time of the commencement of the suit. For instance, *A* resides at Allipore, but goes to work regularly to Howrah: a suit against him may be instituted either at Allipore or at Howrah.

The foregoing Section gives jurisdiction "if the defendant shall dwell, or personally work for gain" within the local limits of a Court's jurisdiction. The Charter of the

High Court (Section 12,) has the words "or carry on business" after the word "dwell," an important addition, which it would not be amiss to import into this place.

It was held by the Madras Sudder Court, 1st October, 1860: "District Moonsiffs are competent to receive and try suits for sums of money or other personal property under ten rupees in value.

"A District Moonsiff is competent to try a suit instituted against the Collector, arising out of an act done in his official capacity."

See the rules in Act IX. of 1861, (in the Appendix,) regarding the jurisdiction of the Civil Courts in the matter of the custody and guardianship of minors.

SECTION 5 *a*.

[Section 4, Act XXIII. of 1861.]

In what Court a suit against several defendants may be brought.

If in any suit there are more defendants than one, and at the date of the institution of the suit all the defendants shall not reside within the jurisdiction of the Court in which the suit is brought, but one or more of the defendants shall reside within such jurisdiction, the suit shall not be rejected by reason of all the defendants not residing within the jurisdiction of the Court in which the suit is brought; but the District Court, if the suit is pending in any Court subordinate to such Court or the Sudder Court, may order that the suit be heard in any Court subordinate to such Sudder or District Court, and competent in respect of the value of the suit to try the same.

This rule is analogous to the rules in Sections 11, 12, and 13, regarding suits for lands or other immovable property, lying in different jurisdictions. To obtain an order, as to the Court in which a suit, against defendants residing in different jurisdictions, should be tried, it must be proved to the District Court, or the High Court, that such order will be conducive to the benefit of the majority of the persons concerned.

SECTION 6.

Court in which suit to be instituted.

Transfer of suits.

Every suit shall be instituted in the Court of the lowest grade competent to try it. But it shall be lawful for the District Court to withdraw any suit instituted in any Court subordinate to such District Court and to try such suit itself, or to refer it for trial to any other Court subordinate to its authority, and competent in respect of the value of the suit to try the same, whenever it may see sufficient cause for so doing. In like manner the Sudder Court may order that the cognisance of any suit or appeal, which may be instituted in any

Court subordinate to such Sudder Court, shall be transferred to any other Court subordinate to its authority, and competent in respect of the value of the suit or appeal to try the same.

For instance: a claim for Rs. 100 is cognisable by the Moonsiff, Sudder Ameen, Principal Sudder Ameen, and Judge. But it can only, under this Section, be instituted before the Moonsiff, the Court of the lowest grade.

The rest of the Section is conformable to the practice which heretofore obtained, under the Circular Order of the Calcutta Sudder Court, dated 7th December, 1838. Although not expressly stated, it is presumed that the Court ordering the transfer will state its reasons for it. It would appear that no provision corresponding with that in Section 12, Regulation III. of 1793, by which, after the institution of a suit in a competent Court, a second suit on the same cause of action could not be instituted, has been made in the present Code. If a second suit be instituted, the power given by this Section will enable the higher Court to transfer it to the Court where the first suit is pending.

"The institution of a second suit in another Court, for the same cause of action, during the pendency of the first suit, is no longer punishable by dismissal of the second suit, as was the case under Section 12, Regulation III. of 1793; but, under Section 6 of the Code, the superior Courts have the power of transferring such second suit to the Court in which the first suit is being tried."—*Calcutta Sudder Court's Circular Order, 29th July*, 1859.

The Madras Sudder Court held, 1st September, 1860, that this Section does not apply to the transfer of petitions, in which claims are made to attached property before one district Moonsiff, to another district Moonsiff for disposal.

SECTION 7.

Suit to include the whole claim. Relinquishment of part of claim.

Every suit shall include the whole of the claim arising out of the cause of action; but a plaintiff may relinquish any portion of his claim, in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained.

This provides against splitting a cause of action. The provision is similar to that made by the Circular Order of the 11th January, 1839, of the Calcutta and Agra Courts, in regard to claims of inheritance.

SECTION 8.

Joinder of causes of action in the same suit.

Causes of action by and against the same parties and cognisable by the same Court may be joined in the same suit, provided the entire claim in respect of the amount or value of the property in suit do not exceed the jurisdiction of such Court.

For instance, *A* has three causes of action against *B*, *first*, on a bond of 1851, for Rupees 50; *second*, on a bond of 1851, for Rupees 40; and, *third*, on a bond of 1852, for Rupees 70. *A* can sue *B* for the recovery of the monies secured by these bonds in one suit before a Moonsiff, the total amount not being greater than Rupees 300, and the parties concerned in each cause of action being the same. The institution fee under this Section must be sufficient to cover the total value of the several causes of action.

SECTION 9.

Court may, in certain cases, order separate trials of such causes of action.

If two or more causes of action be joined in one suit, and the Court shall be of opinion that they cannot conveniently be tried together, the Court may order separate trials of such causes of action to be held.

Illustrations. *A* sues *B* in one suit, *first*, on a bond for an amount certain; *second*, for a partnership account; and, *third*, for the recovery of a piece of land in the possession of *B*. The Court will order three cases to be made of this suit and proceed to trial accordingly. If the original institution fee paid be not sufficient to cover the amount of each cause of action, it will be necessary to demand an additional institution fee for the difference; but in all other respects the cases will be proceeded with as three separate cases.

The Bombay Sudder Court communicated to the Judge of Poona an opinion to the same effect with that here expressed.

So also in a suit instituted by *A* against *B* and *C*, claiming, as against *B* his brother, *first*, a share of the family property by the right of inheritance, and, *secondly*, settlement of partnership accounts of a concern carried on by both; and, *thirdly*, against *B* and *C*, the recovery of monies lent on a bond. According as the Court thinks that the first two causes of action against *B* can be tried together, or not, it will order their trial as one case, or separately, as provided by this Section. The third cause of action may

also be tried with the other two, if *A* wish and obtain the leave of the Court to strike off *C*; otherwise, he must bring a new action on the bond against *B* and *C*. See also remarks on Section 73.

As to the mode in which the rule is to be carried out, it may be observed that, if three cases be made out of one, the original plaint may be kept with one *misl*, and copies put in the other two *misls*.

"The misjoinder of two or more causes of action also no longer subjects the plaintiff to a nonsuit. Under Section 9 of the Code, the Court will, in such cases, direct that those causes of action, which cannot conveniently be tried together, shall be tried as separate suits. It will be necessary, however, to take care in these cases, that the original institution fee is sufficient to cover all the different causes of action in the plaint."—*Cal. S. C. Cir. Or. 29th July*, 1859.

The Madras Sudder Court ruled, 16th April, 1860, that when separate trials of causes of action, which have been improperly included in one suit, are ordered, a separate plaint should be taken for the cause thus severed from the rest, in order that the record of each suit may be complete in itself, and that, if the original stamp be sufficient to cover the whole claim, such additional plaint may be written on plain paper.

SECTION 10.

A claim for the recovery of land and a claim for the mesne profits of such land shall be deemed to be distinct causes of action, within the meaning of the two last preceding Sections.

Claims for recovery of land and for mesne profits to be deemed distinct causes of action.

This Section was enacted to remove an uncertainty as to the proper rule of practice. Before the issue of the Calcutta Sudder Court's Circular of the 15th June, 1849, it used to be sometimes held that, where a suit was brought for possession of land without including mesne profits, no suit for the latter could be separately brought. This Section gives legislative force to the Circular, and provides that a claim for land and that for its mesne profits are distinct causes of action, but may be joined in one suit, or otherwise, at the option of the plaintiff under Section 8.

SECTION 11.

Suits for immovable property situate within different jurisdictions of the same District.

If the suit be for land or other immovable property situate within the limits of a single District, but within the jurisdiction of different Courts, the suit may be brought in the Court within the jurisdiction of which any portion of such land or other immovable property is situate, provided the entire claim in respect of the value of the property in suit be cognisable by such Court; but in such case the Court in which the suit is brought shall apply to the District Court for authority to proceed with the same.

SECTION 12.

Suits for immovable property situate in different Districts.

In like manner, if the property be situate within the limits of different Districts, the suit may be brought in any Court, otherwise competent to try it, within the jurisdiction of which any portion of the land or other immovable property in suit is situate; but in such case the Court in which the suit is brought shall apply to the Sudder Court for authority to proceed with the same: if the suit is brought in any Court subordinate to a District Court, the application shall be submitted through the District Court to which such Court is subordinate.

SECTION 13.

Suits for immovable property situate in Districts subject to different Sudder Courts.

If the Districts within the limits of which the property is situate are subject to different Sudder Courts, the application shall be submitted to the Sudder Court to which the District, in which the suit is brought, is subject; and the Sudder Court to which such application is made may, with the concurrence of the Sudder Court to which the other District is subject, give authority to proceed with the same.

The practice formerly was, when lands or other immovable property sued for were in different jurisdictions, to bring the suit in the Court wherein the larger portion of the property was situated. This Section gives the plaintiff liberty to bring the suit in any Court which any portion of the property may be subject to, provided it has jurisdiction in respect to the value of the entire claim. A plaintiff, to harass his adversary, may sometimes bring a suit under this Section in a Court not very conveniently situated for its fair prosecution. For instance, *A* sues *B* in Hooghly for a share of the family property mostly situated in Rajshahye (both being inhabitants of that district,) but of which a small portion is in the former district. The remedy for this is easy. The case can be transferred to Rajshahye under Section 6.

SECTION 14.

Suit for land situate on the borders of the Court's local jurisdiction, and alleged by the defendant to be within another local jurisdiction.

If, in a suit for land situate on the borders of the Court's local jurisdiction, the defendant object to the hearing of the suit on the ground that the land is not included within the local jurisdiction of the Court, the Court shall have power to determine the point; and if the Court shall find that the land is included within its local jurisdiction, it shall proceed to try the suit. Provided that, if it be shown that the land in dispute has been adjudged by competent authority to belong to an estate, village, or other known division of land situate within the local jurisdiction of another Court, the Court in which the suit is brought shall reject the plaint, or return it to the plaintiff in order to its being presented in the proper Court.

Proviso.

This provision is made to prevent defeature of justice in cases wherein, though sometimes too late, it has been discovered that the Court deciding them had no jurisdiction. It often happens, when a suit is instituted regarding a contested boundary, the defendant meets the claim by denying the jurisdiction of the Court in which the suit is brought. This Section enacts that the Court will have the power of deciding that point at once. If it find for the plaintiff, it will proceed with the case. If it find otherwise, on its own investigation, or on the production of a decree of competent authority, it will either reject the plaint or return it for the purpose of its being filed in the proper Court. The Court of course will be guided, in determining which of these steps should be taken, by the circumstances of each case, as to whether the plaint was filed by misapprehension, or for the purpose of annoyance.

SECTION 15.

Declaratory suit.

No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby; and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief.

It is necessary to illustrate this Section by a few examples. *A*, a Hindoo, dies, leaving a widow, a daughter, and a grandson by the latter; the widow sets up an adopted son to *A*: the daughter may bring a suit for declaration of her title to succeed *A* by the reversal of the adoption.—A purchases a piece of land from *B* and obtains possession; *C* claims it: *A* may bring a suit for declaration of his title by the annulment of that of *C*.—In the provinces where

the law of the Mitakshara prevails, a son can bring a suit against his father, under this Section, to declare his right of succession and prevent alienation by the latter.

CHAPTER II.

PRELIMINARY RULES.

SECTION 16.

Parties may appear in person, or by recognised agent or pleader.

All applications to any Civil Court, and all appearances of parties in any Civil Court, except when otherwise specially provided by this Act, shall be made by the party in person, or by his recognised agent, or by a pleader duly appointed to act on his behalf.

Heretofore, after the repeal of Regulation XII. of 1833, of the Bengal Code, parties could appear in the Civil Court only in person, or by a vakeel, attorney, or barrister. This Section provides that he may also appear by his recognised agent.

SECTION 17.

Recognised agents.

The recognised agents of parties by whom such applications and appearances may be made are :—

Persons holding powers of attorney from absent persons.

1*st*.—Persons holding general powers of attorney from parties not within the jurisdiction of the Court, authorising them to make such applications and appearances on behalf of such parties.

Persons carrying on trade or business for absent persons.

2*ndly*.—Persons carrying on trade or business for and in the name of parties not within the jurisdiction of the Court, in matters connected with such trade or business only, where no other agent is expressly authorised to make such applications or appearances.

Persons authorised to act for Government.

3*rdly*.—Persons being ex-officio or otherwise authorised to act for Government in respect of any suit or judicial proceeding.

Persons appointed to prosecute or defend a suit for a Sovereign Prince, &c.

4*thly*.—Persons specially appointed by order of Government, at the request of any Sovereign Prince or Independent Chief, whether residing within or without the British territories, to prosecute or defend a suit on his behalf.

Acts required to be done by a party to a suit in person may be done by his recognised agent.

Whenever the personal appearance of a party to a suit is required by this Act, such appearance may be made by his recognised agent, unless the Court shall otherwise direct ; and anything which by this Act is required or permitted to be done by a party in person may be done by his recognised agent. Notices given to

Service of notices, &c., on recognised agents.

or processes served on a recognised agent relative to a suit, shall be effectual for all purposes in relation to the suit, as if the same had been given to or served on the party in person, unless the Court shall otherwise direct; and all the provisions of this Act, relative to the service of notices or processes on a party to a suit, shall be applicable to the service of notices and processes on such recognised agent.

A recognised agent can only appear when the party for whom he appears is not within the jurisdiction of the Court. He may appear under a general power of attorney, or as the agent or gomashtah of the party. For instance *A*, an inhabitant of Hooghly, has a firm or *cootee* at Berhampore, of which *B* is the gomashtah: the latter can appear for *A* without a formal power of attorney in suits relating to the firm. In short, parties within the jurisdiction may appear personally or by pleader; when out of the jurisdiction they may appear personally, or by the duly authorised agent, (or, if traders, by gomashtah,) or by pleader. Persons authorised on behalf of Government, such as Government pleaders and others specially appointed to conduct Government suits or the suits of Sovereign Princes, may also appear of course.

The last part of this Section applies to cases in which appearances are entered through a recognised agent. Considerable difficulty arose, under the former rules of procedure, in serving processes of the Court on the parties to the suit, and in many cases failure of justice occurred. This difficulty was particularly felt in the service of subpœnas under Act XIX. of 1853. Hence the provisions of this and the following Sections. The service of process on the agent or pleader is deemed sufficient in law for all intents and purposes. A party to a suit who may be cited as a witness can be proceeded against for not appearing to give evidence, although the notice may not have been personally served on him. The Court, however, is at liberty to order personal service, instead of service on the agent or pleaders, whenever it shall think proper.

See Section 115 and the remarks under it, regarding the appearance of a plaintiff or defendant for a co-plaintiff or co-defendant.

Held by the Madras Sudder Court, 1st October, 1860: "Section 17, clauses 1 and 2. No person can be allowed to make applications or appearances, as the recognised agent of a party, unless the party himself be ordinarily

residing *out of the Court's jurisdiction*, and the agent hold a *general power* of attorney."

SECTION 18.

Appointment of pleader.

The appointment of a pleader to make any such application or appearance as aforesaid shall be in writing, and shall be filed in the Court. When so filed, it shall be considered to be in full force until revoked by a writing filed in the Court. All notices given to or process served on the pleader of any party, or left at the office or ordinary residence of such pleader, relative to a suit, and whether the same be for the personal attendance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and shall be as effectual for all purposes in relation to the suit as if the same had been given to or served on the party in person, unless the Court shall otherwise direct.

Service of notice, &c., on pleaders.

SECTION 19.

Officers or Soldiers, who cannot obtain leave of absence, may authorise any person to appear for them.

When an Officer or Soldier in the service of the Government is a party to a suit, and cannot obtain a furlough or leave of absence for the purpose of prosecuting or defending the suit in person, he may authorise any member of his family or any other person to commence, conduct, and manage the suit or the defence, as the case may be, in his stead. The authority shall be in writing, and shall be signed by the Officer or Soldier in the presence of his Commanding Officer, who shall countersign the same, and it shall be filed in the Court. When so filed, the counter-signature of the Commanding Officer shall be sufficient proof that the authority was duly executed, and that the Officer or Soldier by whom it was granted could not obtain a furlough or leave of absence for the purpose of prosecuting or defending the suit in person.

SECTION 20.

The person so authorised may appear personally or appoint pleader.

Any person who may be authorised, as in the last preceding Section mentioned, by an Officer or Soldier, to prosecute or defend a suit in his stead, shall be competent to prosecute or defend it in person in the same manner as the Officer or Soldier could do if present, or he may appoint a pleader of the Court to prosecute or defend the suit on behalf of such Officer or Soldier. And all notices or processes relative to the suit, which may be served upon any person who shall be so authorised as aforesaid by an Officer or Soldier, or upon any pleader who shall be appointed as aforesaid by such person to act for or on behalf of such Officer or Soldier, shall be as effectual for all purposes relative to the suit as if the same had been served on the party in person or on a pleader appointed by him.

SECTION 21.

Certain women exempt from personal appearance.

Women, who, according to the custom and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal appearance in Court.

When the evidence is necessary, it should be taken by commission under the provisions of Section 175.

The Calcutta Sudder Court held, 11th July, 1860, and the Madras Sudder Court, 1st October, 1860, that females, who are entitled to the privilege granted by this Section, are not liable to arrest so long as they remain in their *zenanas*.

SECTION 22.

Government may exempt persons of rank from personal appearance.

The Government may at its discretion exempt from personal appearance in Court any person whose rank, in the opinion of the Government, entitles him to the privilege of exemption, and may at its discretion withdraw such privilege. The names of the persons so exempted (if any,) residing within the jurisdiction of the principal Civil Court of each District, shall from time to time be forwarded to such Court by the local Government, and a list of such persons (if any) shall be kept in such Court and in the several subordinate Courts of the District.

The very extensive power given to the Civil Courts, by Act XIX. of 1853, of enforcing the personal attendance of parties to a suit, was liable to abuse, and had been abused. That law caused great dissatisfaction among the upper classes. The new Code avoids the evil, by giving the Executive Government the power of exempting such persons as they think proper from personal attendance in Court.

The Bengal Government have recently determined that all *Sunudee* Rajahs, and Mahomedan nobles of corresponding rank, are, under this Section, to be exempted from personal attendance.

SECTION 23.

[Repealed by Section 1, Act XXIII. of 1861, and re-enacted by Section 2 as follows, with the *addition* of the words regarding the time of payment of costs.*]

Cost of serving process.

Requisite sum to be paid into Court within a certain time before process is issued.

Every process, required to be issued under Act VIII. of 1859, shall be served at the expense of the party at whose instance it is issued, unless otherwise specially directed by the Court; and the sum required to defray the costs of such service shall be paid into the Court before the process is issued, within a period to be fixed by the Court issuing the process.

Vide Section 113 as to the object of inserting the clause fixing the time of paying in the costs.

* Under Section 193 of the Indian Penal Code, the punishment for either crime is "imprisonment of either description for a term which may extend to seven years" and liability to "fine."

See Section 113 *a*, regarding cases in which the defendant may not have been served with the summons, owing to the plaintiff's failure to deposit the costs, and may nevertheless be in attendance.

See also notes on Section 41.

SECTION 24.

Punishment for false verification of plaint, statement, &c.

If any plaint, written statement, or declaration in writing, required by this Act to be verified, shall contain any averment which the person making the verification shall know or believe to be false, or shall not know or believe to be true, such person shall be subject to punishment according to the provision of the law for the time being in force for the punishment of giving or fabricating false evidence.*

This is a necessary provision to give effect to the verification of plaint, written statement, or declaration required by this Act. Without it the verification would be valueless. A formal oath is not necessary.

It is sometimes objected to this Code that the fear of verifying plaints will deter people from applying to the Courts for redress. The objection is groundless; although it may mislead people for a time. The object of verification is to exact a guarantee of the truth of his complaint from the plaintiff, or, in other words, that what he has stated in the plaint is true to the best of his information. Every plaint filed before the passing of this Code was founded on this theory, but the guarantee was wanting. It does not necessarily follow that a party should be criminally convicted because he loses his case, which for aught he knew was a true one, though he may have failed to prove it. For instance, a party may sue, believing in the truth of his case, for balance of partnership accounts, or for partition or possession of land. The dismissal of his case can hardly ever subject him to any penalty. The guarantee of a declaration on the other hand will not allow a party bringing a grossly false suit to get off with impunity, as was the case when no guarantee was taken. Thus, when a suit is brought on a palpably forged bond and dismissed, the plaintiff becomes liable to the penalties of perjury and forgery under Section 24.

* Under Section 190 of the Indian Penal Code, the punishment for either crime is "imprisonment of either description for a term which may extend to seven years" and liability to "fine."

CHAPTER III.

OF A SUIT TILL FINAL DECREE.

On the Institution of Suits.

SECTION 25.

Suits to be commenced by plaint.

All suits shall be commenced by a plaint which, except when otherwise specially provided by this Act, shall be presented to the Court by the plaintiff in person, or by his recognised agent, or by a pleader duly appointed to act on his behalf.

"Recognised agent," as described in Section 17.

SECTION 26.

Particulars to be given in the plaint.

The plaint shall be distinctly written in the language in ordinary use in proceedings before the Court, and shall contain the following particulars :—

1.—The name, description, and place of abode of the plaintiff.

2.—The name, description, and place of abode of the defendant, so far as they can be ascertained.

3.—The relief sought for, the subject of the claim, the cause of action and when it accrued, and, if the cause of action accrued beyond the period ordinarily allowed by any law for commencing such a suit, the ground upon which exemption from the law is claimed.

The following are instances :—

If the suit be for money due on a bond or other written instrument :—Payment of ———— due on (*a bond or other written instrument, as the case may be*) for the sum of ———— bearing date the ——— day of ————, and payable on the —— day of ————, namely—

Principal, ...
Interest, ...

Amount paid (if any) .....

Balance due, ...

If the plaintiff claim exemption from any law of limitation, say—The plaintiff was an infant *(or as the case may be)* from the ———— day of ———— to the ——— day of ———

If the suit be for the price of goods sold :—Payment of ———— on account of ——— maunds of *(rice, indigo, sugar, or as the case may be,)* sold on the ———— day of ————, and the price of which became payable on the ——— day of ————, as per account at foot.

If the suit be for damages for an injury done :—Payment of ———— on account of injury done to the plaintiff [*here set out the nature of the injury, and state the particulars of the pecuniary loss, if any*].

4.—When the claim is for any property other than money, its estimated value. The following is an instance :—

If the suit be for an estate or for a share in an estate paying revenue to Government:—Possession of the estate (*or of* ——— *share in the estate*) called ———, situate in the zillah of ——— the sudder jumma of which is ——— and estimated value ——— of which the plaintiff was dispossessed (*or forcibly or fraudulently dispossessed, if the case be so,*) on the —— day of ——— (*or to which the plaintiff became entitled by inheritance from* ——— *or by gift, purchase, or otherwise, as the case may be, on or about the* ——— *day of* ———).

5.—When the claim is for land or for any interest in land, the nature of the tenure or interest must be specified; and if the claim be for land forming part of a village or other known division, or for a house, garden, or the like, its situation shall be described by the setting forth of boundaries, or in such other manner as may suffice for its identification.

6.—In all suits by or against the Government, or one of its Officers in his official capacity, or any Corporation, or any Company authorised to sue and be sued in the name of an Officer or Trustees, the words "The Government," or "The Collector of ———," or otherwise, as the case may be, or the name of the Corporation, or the name or names of the Officer or Trustees of the Company, shall be inserted in Nos. 1 and 2 instead of the name and description of the plaintiff or defendant. But in all other cases it shall be necessary to specify the names of all the parties.

It is not intended by these examples to prevent the plaintiff from stating the particulars of his case in the plaint. The plaint must be concise, and at the same time sufficient to enable the defendant to understand the nature of the claim against him.

The brevity of the plaint is compensated by the option given to the parties to file written statements of their cases at the hearing when necessary. The discursive nature of the pleadings generally filed in the Courts, and the introduction of argumentative matter therein, have been subjects of general complaint. This Code supplies a remedy for those defects, and at the same time affords a security against failure of justice.

A few forms of plaints under this Section, in suits ordinarily instituted in the Civil Courts, are given in the Appendix.*

Para. 4.—The estimated value means the value as estimated according to law. For instance, the estimated value of an estate paying revenue to Government in the permanently settled provinces is three times the revenue. Where the valuation is not prescribed by law, it should be calculated at the selling price.

* Forms of plaint:—
In a suit on bond.
" for resumption.
" for assessment.
In a suit for damages.
" for possession.
" for price of goods.
" concerning adoption.

Held by the Madras Sudder Court, 1st October 1860: "The valuation of suits for land is to be made on one year's produce, inclusive of the assessment, but exclusive of the expenses of cultivation."

Para. 6.—For instance, the Oriental Bank Corporation may sue or be sued in its name as such Corporation,—the Bengal Indigo Company in the name of its Secretary,—and the Government, in suits on its part, in its own name or in the name of one of its officers,—according to the circumstances of the case.

"6. Upon a plaint being presented, the judge or other presiding officer should note or cause to be noted on the back the date of presentation, and whether it has been presented by the plaintiff in person or by his authorised agent or pleader.

"7. He should then examine the plaint carefully, to see that it contains the particulars specified in Section 26; that it is not unnecessarily prolix; and that it is verified in the manner directed in Section 27.

"10. The attention of the Courts is particularly directed to the specimens of plaints contained in Section 26; and to the necessity of great firmness at first in order to check the tendency to prolixity which the mooktears and others, who have hitherto been in the habit of drawing up plaints, will doubtless evince. When the plaint contains any argument or anything beyond a concise statement of the points enumerated in Clauses 1, 2, and 3 of Section 26, it should invariably be returned for amendment, or, in extreme cases, rejected.

"11. The presiding officers should next consider whether the plaint is inadmissible on any of the grounds indicated in Sections 8, 9, 30, 31, 32, or 33."—*S. C. Cir. Or., 29th July*, 1859.

SECTION 27.

Plaint to be subscribed and verified.

The plaints shall be subscribed by the plaintiff and his pleader (if any), and shall be verified at the foot by the plaintiff in the manner following, or to the like effect:

I (A. B.), the plaintiff named in the above plaint, do declare that what is stated therein is true to the best of my information and belief.

The plaint is to be signed by the party and his pleader, *i. e.* the signature of the plaintiff and his pleader at the foot

of the plaint will be necessary. But it will be verified by the plaintiff alone, or as provided in the next Section. The personal attendance of the plaintiff is not necessary for the verification of his signature.

"The personal attendance of the plaintiff in Court for the purpose of verification is unnecessary. He may make the verification and sign the plaint where he pleases. He must present it, however, in Court, either in person or through a duly appointed pleader, unless he is not within the jurisdiction of the Court, in which case alone he is authorised under Section 16 to appear by a recognised agent. The pleader must sign the plaint, but is not required to verify it. In all these cases the plaintiff, however, is responsible for the statements contained in his plaint."—*Cal. S. C. Cir. Or., 29th July*, 1859.

Held by the Madras Sudder Court, 1st October 1860: "The verification of the plaint need not be made by the plaintiff in Court."

SECTION 28.

When plaintiff is unable, the Court may allow another person to subscribe and verify the plaint.

In suits by a Corporation or Company, a Director or Secretary shall verify the plaint.

If the plaintiff, by reason of absence or for other good cause, be unable to subscribe and verify the plaint, the Court may allow the plaint to be subscribed and verified on behalf of the plaintiff by any person whom the Court may consider competent to make the verification. In suits by a Corporation or a Company authorised to sue and be sued in the name of an Officer or Trustees, the plaint shall be subscribed and verified on behalf of the Corporation or Company by any Director, Secretary, or other principal Officer of the Corporation or Company, who may be able to depose to the facts of the case.

"By reason of absence," *i. e.* being at such a distance from the jurisdiction of the Court as would render the plaintiff unable to subscribe and verify the plaint. "Other good cause," such cause as the Court in its discretion may judge sufficient to excuse the plaintiff. The sex of the plaintiff *per se* is no good cause under this Section. The ignorance of the plaintiff as to the details of his case, in consequence of his affairs being managed at a distant place by his agents and gomashtah, would constitute a good cause: for such cause the Court will allow the plaint to be subscribed and verified by any person who may be competent to do so from his personal knowledge of the facts of the case. Parties who have frequently to resort to the Courts

will attempt to neutralise the wholesome provision of this Section, by respectively appointing some one person to verify all plaints filed on their behalf. This of course will not be tolerated by the Courts.

"9. Under Section 28 the Court, in the event of plaintiff's absence or for other good cause, may allow the verification to be made by any person they consider competent. Care must be taken, however, that this provision is not abused. Good cause must always be shown for non-verification of the plaint by the plaintiff himself; and no person shall be considered competent to verify who is not *personally* acquainted with the facts of the case."—*S. C. Cir. Or., 29th July*, 1859.

The Calcutta Sudder Court intimated to a district judge that, if the plaintiff be absent, the plaint need not invariably be verified by his authorised agent, but may be verified by any one personally acquainted with the facts of the case.

Held by the Madras Sudder Court, 1st October 1860: "Persons competent to subscribe and verify plaints on behalf of plaintiffs, are those who are able to depose to the facts of the case, and have a knowledge of the circumstances forming the ground of action, which the plaintiff cannot possess; as, for instance, shopmen employed in the sale of the goods of their employers, and the like, not *mookhtyars* or other such agents.

"The plaint in such instances may be brought already subscribed and verified, but will be liable to rejection, if there should be no cause for allowing any person other than the plaintiff to perform those acts, or if the person by whom they may have been performed should not be considered competent for the purpose.

"If the plaintiff be absent, the plaint need not invariably be verified by his authorised agent, but may be verified by any one personally acquainted with the facts of the case."

SECTION 29.

If the plaint do not contain the several particulars hereinbefore required to be specified therein, or if it contain particulars other than those required to be specified, whether relevant to the suit or not, or if the statement of particulars be unnecessarily prolix, or if the plaint be not subscribed and verified as hereinbefore required, the Court may reject the plaint, or at its discretion may allow the plaint to be amended.

Court may reject plaint, if it do not contain the required particulars, &c.

Amendment of plaint.

By this Section a very large discretion is given to the Courts to reject or amend plaints. It is hardly necessary to say that judicial officers of all, and particularly those of the subordinate grades, should exercise this discretion with the greatest caution. It will be in their power to do incalculable mischief by wantonly rejecting plaints or returning them for amendment. In the peculiar circumstances attending the operation of this Code, it would be fitting the position of these officers to convey, in the first instance, to the mookhtyars and the pleaders of their respective Courts, a correct idea of what is required to be inserted in the plaint under this Code, before criticising the plaints that may be brought before them. It is doubtful whether, during the next six months, such a complete alteration, in the habits and modes of thinking of suitors and their agents can be effected as would ensure a right appreciation of the simple form of procedure laid down by this Code.

Held by the Madras Sudder Court, 1st October 1860: "Sections 29, 30, and 32. Whenever the Court may allow a plaint to be amended under any of these Sections, a time should be fixed, and the plaint rejected if not amended within such time."

See the remarks on Section 336.

SECTION 30.

Plaint to be returned, if the claim be beyond the jurisdiction of the Court.

If the amount or estimated value of the claim, as stated by the plaintiff, be beyond the jurisdiction of the Court, the plaint shall be returned to the plaintiff in order to its being presented in the proper Court.

SECTION 31.

Plaint to be rejected, if improperly or insufficiently valued.

If it appear to the Court that the claim is improperly valued, or, being properly valued, that the plaint is written upon stampt paper of inadequate value, and the plaintiff, on being required by the Court to correct such improper valuation or to supply such additional stampt paper as may be necessary, shall not comply with the requisition, the Court shall reject the plaint.

"12. If he find it necessary to reject the plaint, he must record a judicial order to that effect in his own vernacular, with his reasons for such order, either on the back of the plaint or on a separate paper: and the plaint, with the judgment and any deposition of the plaintiff, or his pleader or authorised agent, which may have been taken, will then

be deposited in the record-room of the Court in the usual manner."—*S. C. Cir. Or., 29th July*, 1859.

SECTION 32.

Plaint to be rejected, if it appear to the Court that plaintiff has no cause of action, or that right of action is barred by lapse of time.

Amendment of plaint.

If, upon the face of the plaint, or after questioning the plaintiff, it appear to the Court that the subject-matter of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time, the Court shall reject the plaint. Provided that the Court may in any case allow the plaint to be amended, if it appear proper to do so.

SECTION 33.

[Repealed by Section 1, Act XXIII. of 1861, and re-enacted by Section 3, as follows.]

Plaint to be returned, if it appear to the Court that it has not jurisdiction.

If it appear to the Court, in any case relating to land or other immovable property, that such land or other property is not situate within the limits of the jurisdiction of the Court, or, in any other case, that the cause of action did not arise, and that the defendant is not dwelling or personally working for gain, within such limits, the Court shall return the plaint to the plaintiff in order to its being presented in the proper Court.*

The scope of these Sections appears to be materially different from the practice that existed before the enactment of this Code. In regard to the admissibility of a plaint, what was formerly required from the defendant is now, to a great extent, to be performed by the Court. Under the former practice all plaints were indiscriminately accepted, and thereupon notices issued to the defendants. By the new Code, a plaint is not considered as filed and fit to be acted upon, until the Court finds *primâ facie* that it has jurisdiction in regard to value (Section 30); that the suit is properly valued, and the plaint engrossed on adequate stamp (Section 31); that there is a cause of action, and that the right is not barred by lapse of time (Section 32); and that the defendant is subject to the jurisdiction of the Court, or, in case of land, that the land sued for is situated within its jurisdiction.

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* The difference between this Section as it stands and that which has been repealed, consists merely in the mention of suits for real property *before* suits of other kinds, and in the substitution of *and* for *or*. When the alteration was proposed, it was considered doubtful whether the copulative or the disjunctive conjunction should be used! But it is obvious that the discovery of *either* of the contingencies supposed in the second clause could not affect the Court's jurisdiction, but of *both*.

The Bombay Sudder Court, on a reference from the Judge of Poona, ruled that, if want of jurisdiction be discovered after the defendant has been summoned and examined by the Court, the plaint cannot be returned, but the plaintiff may be allowed, under Section 97, to withdraw his suit. The Madras Sudder Court ruled the same, 1st October, 1860.

"13. If a plaint be returned to the party presenting it for amendment, the date of its presentation and return, the name of the party presenting it, and a concise reason for its return, such as 'too prolix,' or 'argumentative,' 'no jurisdiction in this Court,' &c., shall be endorsed upon it before it is returned, and signed and sealed by the presiding officer.

"14. A register shall be kept of all returned, and another of all rejected plaints, in the following form.

1	2	3	4	5
Date of presentation.	By whom presented	Ground of { Return / Rejection } concisely stated.	Date of { Return. / Rejection }	Signature of Judicial Officer.

"15. These registers should be bound, the pages numbered, and each page stamped with the Court's seal. They should be filled up on the bench by the serishtadar, or other head officer present, when the order is passed; and the Amlah should not be permitted to fill them up afterwards or in a separate room from the presiding officer."—*S. C. Cir. Or., 29th July*, 1859.

Section 34.

A suit by a party ordinarily residing out of the British territories in India, and not possessing any land or other immovable property within those territories, independent of the property in suit, shall not be entertained, unless the plaintiff, at the time of presenting the plaint, or within such time as the Court shall order, furnish security for the payment of all costs that may be incurred by the defendant in the suit. In the event of such security not being furnished, the Court shall return the plaint to the plaintiff.

Security for costs to be furnished by plaintiff at the time of presenting the plaint, if he reside out of the British territories in India.

Plaint to be returned, if security be not furnished.

SECTION 35.

Security for costs may be required in any stage of suit, if it appear that plaintiff resides out of British India.

If in any stage of a suit it shall appear to the Court that the plaintiff (being sole plaintiff) is a person residing out of the British territories in India, the Court may order him, within a time to be fixed by such order, to furnish security for the payment of all costs incurred and to be incurred by the defendant in the suit. In the event of such security not being furnished within the time so fixed, the Court shall pass judgment against the plaintiff by default, unless he be permitted to withdraw from the suit under the provisions of Section 97.

The provisions of these Sections are similar to those of Regulation XIV. of 1829, of the Bengal Code. That Regulation required security both from the plaintiff and defendant. Under the new Code that from the latter has been dispensed with for evident reasons. Ample provision has been made by Sections 74 and 80 of this Code for the indemnification of the plaintiff for his costs, in case the defendant attempts to go beyond the jurisdiction of the Court while his case is pending. Where security is demandable under Section 35, after the institution of the suit, the plaintiff may be allowed the option of withdrawing from his suit, subject to the provisions of Section 97.

Under Section 34, it is imperative upon the Courts to demand security from the plaintiff who ordinarily resides out of the British territories, unless he hold lands within those territories independent of the property in suit. Section 35, on the other hand, leaves a discretion with the Court to demand security or not, in regard to persons who are temporarily absent from India, or who have altogether left the country, with reference to the necessity of demanding security, according to the circumstances of each case. Whenever it shall appear to the Court, at any stage of a suit, that the plaintiff is residing out of the British territories, as for instance, when a plaintiff goes to a foreign country during the pendency of his suit, leaving landed property sufficient to meet any demand for costs of the defendant, the Court may refuse to call for security from such plaintiff.

"16. If the plaint be unobjectionable, the Court in which it is presented must next consider, whether it is necessary to take security from the plaintiff under Section 34 or 35, or to apply to the zillah or Sudder Court, under Sections 11, 12, or 13, for authority to proceed with the trial of the suit."—*S. C. Cir. Or., 29th July*, 1859.

SECTION 36.

Appeal from order rejecting plaint.

Whenever a plaint is rejected under any of the foregoing Sections, an appeal shall lie from the order rejecting the plaint. The rejection of a plaint on any of the grounds mentioned in Sections 29 and 31 shall not preclude a plaintiff from presenting a fresh plaint in respect of the same cause of action.

There is an appeal when the plaint is rejected. When the plaint is returned under any of the preceding Sections, there is no appeal. In the case of a returned plaint, no doubt the Courts would think it reasonable to let an amended plaint be engrossed on the same stamp on which the returned one was written, and, even if there be no space for further writing, to allow plain paper to be attached to the stamp. The rejection of a plaint under Section 32 will preclude the plaintiff from bringing a fresh suit on the same cause of action.

The present Stamp Law* requires the appeal under this Section to be on a stamp of the full value, the amount of which is, however, returnable if the appeal be decreed and the plaint restored to the file. It should be observed that plaints can be rejected only under Sections 29, 31, and 32. As those Sections leave it very much to the discretion of the Judges whether the plaints shall be rejected, or whether opportunity shall be given to the party, under Sections 29 and 32, to amend them, or, under Section 31, to make up the full amount of stamps, it is expected that the Courts will give the circumstances full consideration in every case before passing the extreme order of rejection.

Held by the Madras Sudder Court, 1st October, 1860: "An appeal will not lie under this Section in a case where the Court of first instance has had the parties before it, and given a decision, though only on some preliminary point. The only course for any party dissatisfied with the decision in such a case is to prefer a regular appeal against it."

SECTION 37.

Proceeding in a suit for immovable property in different jurisdictions.

If the suit be for land or other immovable property situate partly within the jurisdiction of the Court and partly within the jurisdiction of some other Court or Courts, the Court shall proceed according to the rules contained in Section 11, Section 12, or Section 13, as the case may be.

* Act XXXVI. of 1860, (Schedule B. Art. 5 and 6) superseded by Act X. of 1862, Schedule B. Art. 9 and 11.

SECTION 38.

When the plaint is admissible, particulars to be entered in a register.

Form of the register.

If the Court consider the plaint admissible, the particulars mentioned in Section 26 shall be entered in a book, to be kept for the purpose and called the Register of Civil Suits; and the entries shall be numbered in every year according to the order in which the plaint is presented. The register shall be kept in the form contained in the Schedule A. hereunto annexed.

When the plaint is found correct and not subject to the exceptions taken in Sections 29, 30, 31, 32, and 33, it will be admitted and registered as enjoined by this Section.

"17. If the Court consider the plaint admissible at once, an order must be recorded on its entry in register A.; and a memorandum should also be endorsed on it, at the same time, of the documents which the plaintiff has filed along with it, together with the names of the persons presenting them. This is of great importance, as documents not filed with the plaint are inadmissible afterwards, except on cause shown."—*Cal. S. C. Cir. Or., 29th July*, 1859.

Held by the Madras Sudder Court, 1st October, 1860: "Where a plaint is considered admissible, it is to be received, and the date of presentation noted thereon, but it is not to be entered in the register of civil suits until the plaintiff has deposited the batta requisite for serving a summons on the defendant."

SECTION 39.

Written document to be produced in Court when plaint is presented.

A copy filed with plaint.

Original to be marked and returned.

If plaintiff wish, original may be filed instead of copy.

Court may order document to be impounded.

When the plaintiff sues upon any written document, or relies upon any such document as evidence in support of his claim, he shall produce the same in Court when the plaint is presented, and shall at the same time deliver a copy of the document to be filed with the plaint; if the document be an entry in a shop-book or other book, the plaintiff shall produce the book to the Court, together with a copy of the entry on which he relies. The Court shall forthwith mark the document for the purpose of identification, and, after examining and comparing the copy with the original, shall return the document to the plaintiff. The plaintiff may, if he think proper, deliver the original document to be filed instead of the copy. The Court may, if it see sufficient cause, direct any written document so produced to be impounded and kept in the custody of some Officer of the Court, for such period and subject to such conditions as to the Court shall seem meet.

Document not produced when plaint filed, inadmissible without leave.

Any document not produced in Court by the plaintiff, when the plaint is presented, shall not be received in evidence on his behalf, at the hearing of the suit, without the sanction of the Court.

This Section introduces an improvement in respect to the production of documents required by Section 40, Act XIX. of 1853, and Section 17, Act II. of 1855. By this Section, all documents which the plaintiff relies upon as evidence in his case must be produced in Court at the time the plaint is filed. He is not allowed to file any new documentary evidence during the progress of the suit, unless with the sanction of the Court. The documents referred to are those which are required for the support of the plaintiff's own case. But should the nature of the defence render the production of other documents indispensable to rebut the defendant's case, such documents may be produced by the plaintiff at the hearing of the case under Section 128. He is further required to produce the *original* documents or books of accounts, which are to be returned to him after being marked by the Court for identification, and the copies delivered by him filed with the record. If the Court see any cause for suspicion, or such cause be shown, the Court may, in its discretion, order any such document to be kept in the custody of an officer, and during what time and on what conditions.

The Madras Sudder Court ruled, 16th April, 1860, that, where the document is one requiring to be stamped, and bears no stamp, or an insufficient stamp, no copy of it can be received until the penalty due on the original shall have been paid.

"19. When copies of documents are filed under Section 39, the serishtadar or head officer of the Court will, as a general rule, compare them with the originals, and certify on the face of them that he has done so and that they correspond. Copies of important documents, such as wills and deeds, on which suits are founded, should however be verified by the presiding officer himself."—*S. C. Cir. Or., 29th July*, 1859.

SECTION 40.

Plaintiff requiring production of document in possession of defendant.

If the plaintiff require the production of any written document in the possession or power of the defendant, he may, at the time of presenting the plaint, deliver to the Court a description of the document, in order that the defendant may be required to produce the same.

The plaintiff may move the Court to call upon the defendant to produce any document that may be in his

possession, or at his command. In respect to it the rules of the preceding Section will of course apply. The requisition upon the defendant may be made, at the discretion of the Court, simultaneously with the issue of summons or at any subsequent stage of the suit.

"18. When parties claim to appear as pleaders or authorised agents, their vakalutnamas or powers of attorney should, where practicable, be filed, in original, with the plaint. Where the power of attorney is a general one, a copy should be filed and the original presented for verification.

"21. If the plaintiff wish the defendant to be required to produce any document, it will be observed that he must file a description of it with his plaint, in order that the summons may be framed accordingly. Under the provisions of Section 107, however, he is not precluded from serving the defendant with a notice for this purpose at a later period."—*S. C. Cir. Or., 29th July*, 1859.

Of Summoning the Defendant.

SECTION 41.

On plaint being registered, summons to issue to defendant.

Summons to be either to settle the issues, or for the final disposal of the case.

When the plaint has been registered, a summons under the signature of the Judge and the seal of the Court shall be issued to the defendant to appear and answer the claim, on a day to be therein specified, in person, or by a pleader of the Court duly instructed and able to answer all material questions relating to the suit, or by a pleader who shall be accompanied by some other person able to answer all such questions. The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit, and the summons shall contain a direction accordingly.

A defendant can appear in person, or by his pleader, or by a recognised agent under Section 17. The pleader may be so instructed as to be able to answer all the material questions relating to the suit, or he may have with him some person able to do so. The defendant may be summoned for settlement of issues or for the final disposal of the suit. This will very much depend upon the nature of the suit. In simple cases, for instance, on a bond, the defendant may be summoned at once for the final disposal of the suit, and in that case he will be required to bring his witnesses and other evidence with him. *Vide* form of

summons, Section 44. In complicated cases the summons will ordinarily be only for settlement of issues. The preliminary objections to the receipt of the plaint being disposed of by the Court previous to its admission on the file, the defendant has generally to answer to the merits of the case. He is not, however, prevented from raising such objections in bar as it was impossible for the Court *primâ facie* to determine, such, for instance, as the question of absence of jurisdiction, limitation, *res adjudicata*, valuation affecting jurisdiction, &c.

It is to be observed that the Code does not allow of any written pleadings except the plaint. No written defence is permitted to be filed. The particulars of the plaintiff's and defendant's case will be developed by the examination of the parties under Section 125, and the written statements which they have the option of filing under Section 120.

"There does not appear to be any penalty under Act VIII. of 1859, for delay in proceeding with a suit. The plaintiff therefore cannot be required to take out a summons within any fixed period."—*Cal. S. C. Cir. Or., 29th July*, 1859.

The Calcutta Court (Messrs. Raikes, Patton, and Trevor, against Messrs. Samuells and Loch) have since ruled in the case of Hurukdharee Roy *v.* Moofeezoodeen Hossein, decided on the 24th March, 1860, that, by the analogy of the provision of Section 148, when a certain time is given to the plaintiff to take out summons against the defendant, the Court granting it may, at its discretion, dismiss the suit on default, if the plaintiff do not deposit the tulubana of the peon, and take the other necessary steps.

The Madras Sudder Court have ruled that it cannot be intended to allow the plaintiff to keep his suit on the file for an indefinite period, without taking any proceedings thereon; and that if, on the day fixed for the appearance of the parties, the defendant be not in attendance, owing to the neglect of the plaintiff to pay into Court the requisite fee for the service of the summons, the suit may be dismissed for default of prosecution.

The contingency contemplated in the foregoing rulings has been provided for by Sections 5—7, Act XXIII. 1861, (Section 113 *a*, *b*, *c*.) It is not, however, clear how such a contingency can arise in practice, the fixing of the day of hearing being (under this Section) simultaneous with the

issue of the summons, and the issue of the summons implying (under the original Section 23, and especially Section 2, Act XXIII. 1861, substituted for it) the pre-payment of the costs of service.

"23. On the nazir's reporting that the fees have been deposited, the Court should fix a day, without loss of time, for the appearance of the defendant (Sections 41 and 45). This is a matter which will require considerable care and attention, especially if the parties are to appear in person, for it is very desirable that postponements should take place as seldom as possible, and that, as a general rule, causes should always be heard upon the day fixed. The date specified in the summons also ought in all cases to be so far distant as to afford the defendant ample time to prepare his defence. No general rule can be laid down on this subject; but the Court issuing the summons ought particularly to take into consideration the nature of the case, whether simple or complicated, slight or important, and the state of its own files, together with the particulars noted in Section 45.

"24. A memorandum book, with columns for each Court day in the year, showing the cause set down for trial on each date, will greatly facilitate a decision on this point, and should invariably be kept. A cause list, setting forth the day fixed for the hearing of each cause, ought also to be suspended in the Court room, for the information of parties and their pleaders.

"25. In determining whether the summons shall be for the settlement of issues only, or for the final disposal of the case, (Section 41,) the Court must of course be guided entirely by the nature of the suit, and the probability or otherwise of the facts stated in the plaint being disputed by the defendant, on grounds which will require the production of much evidence or involve much forensic contention. Where the case appears simple, and it seems probable that a correct judgment can be formed at the first hearing from the examinations of the parties or their agents, and such evidence, oral or documentary, as they can bring with them, the summons will of course be for a final disposal of the case at the first hearing."—*Cal. S. C. Cir. Or., 29th July*, 1859.

Held by the Madras Sudder Court, 1st October, 1860: "In the summons to be issued to the defendant, the Court must be guided by the nature of the plaintiff's claim. Thus,

in simple cases, the summons would be for the final disposal of the suit, while in complicated cases it might be, where deemed advisable, for the settlement of issues only."

SECTION 42.

Personal appearance of defendant or plaintiff.

If resident within 50 miles.

Or within the local jurisdiction of the Court.

If the Court see reason to require the personal attendance of the defendant, the summons shall order the defendant to appear personally in Court on the day therein specified. If the Court see reason to require the personal attendance of the plaintiff on that day, it may make an order for such attendance. Provided that no plaintiff or defendant shall be ordered to attend in person, who at the time is *bonâ fide* residing at a distance of more than fifty miles from the place where the Court is held, unless he be resident within the limits of the jurisdiction of the Court.

This is a provision for the personal attendance of the defendant unknown to the former practice of the Civil Court. But the attendance of the defendant in person should be enforced only when necessary for the right administration of justice.

"26. Much discretion will be required in the exercise of the powers vested in the Courts by Section 42, of compelling the personal attendance of the plaintiff or defendant. On the one hand, it is important that this power should not be used so as unnecessarily to harass suitors. On the other, it is one which, if exercised judiciously, will tend to curtail litigation, and will enable the Court to arrive at more satisfactory conclusions than would otherwise be possible. The best general rule which can be laid down on this subject probably is, that parties should only be summoned in those cases where it seems certain that they must have a better personal knowledge of the facts than any one else, and where facts are disputed the correct determination of which is essential to the formation of a satisfactory judgment. To summon a zemindar in many of the disputes which arise between himself and his ryots would in general be a vexatious proceeding, because men of this class usually conduct their affairs through the agency of others, and would therefore be unable to give direct testimony; but in cases where the question is, whether the defendant personally executed a certain deed, or made the contract which the suit seeks to enforce, the interests of justice clearly require that the party himself should be brought into Court.

"27. A wide discretion, however, is left to judicial officers in this matter; and the Court would impress strongly upon the Zillah Judges the importance of watching carefully the manner in which it is exercised by the lower Courts." —*Cal. S. C. Cir. Or.*, 29*th July*, 1859.

The consequence of non-appearance, when plaintiff or defendant has been ordered, under this Section, to appear in person, is stated in Section 117.

SECTION 43.

Summons shall order defendant to produce documents.

The summons to appear shall order the defendant to produce any written document in his possession or power, of which the plaintiff demands inspection, or upon which the defendant intends to rely in support of his defence.

This Section is the complement of Sections 39 and 40.

SECTION 44.

Form of summons.

The summons shall be in the form contained in the Schedule B, hereunto annexed, or to the like effect.

SECTION 45.

The day for appearance of defendant how to be fixed.

The day for the appearance of the defendant shall be fixed by the Court, with reference to the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant a sufficient time to enable him to appear and answer in person, or by a pleader, on such day.

The time should be regulated with reference to the residence of the defendant in all cases, whether he reside within the jurisdiction of the Court issuing the summons, or beyond its jurisdiction as contemplated by Sections 59 and 60.

SECTION 46.

Court may order personal appearance of a director or secretary in suits against a Corporation or Company.

In suits against a Corporation or a Company authorised to sue and be sued in the name of an officer or trustees, the Court may, if it think proper, require the personal attendance of any director, secretary, or other principal officer of the Corporation or Company, who may be able to answer all material questions relating to the suit.

Service of Summons on the Defendant.

SECTION 47.

Summons shall be served by officer of Court.

The summons shall be delivered to the nazir or other proper officer of the Court, to be served by himself or one of his subordinates, and such officer shall be responsible for its due service.

There has always been room for much fraud in the service of summons on the defendant. In some instances the peons of the nazir are induced to make false returns of service of summons, while in others actual service of summons is attempted to be disproved by false evidence. Judicial officers ought to be particularly careful on this point.

SECTION 48.

How service shall be made.

When there are several defendants.

Service of the summons shall be made by delivering or tendering a copy thereof under the signature of the Judge and seal of the Court; and when there are more defendants than one, service of summons shall be made on each defendant.

The proceeding by this rule is very much assimilated to what obtained in the Supreme Court. The original summons remains with the peon, and a copy thereof is given or tendered to the defendant.

SECTION 49.

Service to be on defendant in person, when practicable.

Service on agent sufficient.

Whenever it may be practicable, the service shall be on the defendant in person, unless he have an agent empowered to accept the service, in which case service, on such agent shall be sufficient.

SECTION 50.

Who may be an agent to receive service.

Besides the recognised agents described in Section 17, any person residing within the jurisdiction of the Court may be appointed an agent to receive the service of summonses and other processes.

SECTION 51.

Appointment of such agent to be in writing and to be filed in Court.

The appointment of such agent shall be in writing, and the original appointment, or a copy thereof, if the appointment be a general one, shall be filed in the Court.

Section 50 contains a new provision for the appointment of agents to receive summonses and other processes from the Court. This provision will be mostly resorted to by

parties concerned in a large number of cases. A recognised agent under Section 17 is authorised to receive processes on behalf of his principal. The agent appointed under these Sections must reside either at the station where the Court is held, or at some place within its jurisdiction.

SECTION 52.

Agent of Government.

The Government pleader in each Court shall be accounted the agent of the Government for the purpose of receiving service of summonses and other judicial processes against the Government, issuing out of the Court in which he may be the pleader of Government.

Held by the Madras Sudder Court, 1st October 1860: "Where a suit is instituted in a District Moonsiff's Court against the Government, the summons should be served on the Government pleader of the Civil Court."

SECTION 53.

If defendant cannot be found, and has no agent, service may be made on a male member of his family.

When the defendant cannot be found, and has no agent empowered to accept the service of the summons, it may be made on any adult male member of his family residing with him.

The Court will be careful that the male adult here referred to is really a member of the defendant's family and resides with him. No doubt attempts will be made to take advantage of this provision, by keeping the summons from the knowledge of the defendant. See also the Calcutta Sudder Court's remarks on Section 155, which are specially applicable to the case of the defendant.

SECTION 54.

In all cases the person served is to be required to endorse the summons.

But service is sufficient without.

In all cases where the summons is served on the defendant personally, or any agent or other person on his behalf, the serving officer shall require the signature of the person on whom the service may be made to an acknowledgment of service, to be endorsed on the original summons or on a copy thereof under the seal of the Court. If such person refuse to sign the ackowledgment, the service of the summons shall nevertheless be held sufficient, if it be otherwise proved to the satisfaction of the Court.

Service of summons is generally proved, when there is no receipt given, by the affidavit of the serving officer. In case of proclamation, which followed non-service of sum-

mons under the former practice, a receipt of the persons before whom the proclamation was affixed or stuck up was filed in Court, and in some instances the evidence of those persons was recorded. By the present Code the proclamation has been done away with, but the Courts should use their discretion, under the new practice, as to evidence of service. The evidence of the serving officer and the person who accompanied him on the plaintiff's part will, as a general rule, be sufficient. Where any suspicion is excited, the evidence of persons resident in the neighbourhood, or stated to have been present, should of course be taken.

Held by the Madras Sudder Court, 1st October 1860: "Where it is alleged that the defendant has refused to sign the acknowledgment, the due service of the summons may be proved by the deposition of the serving officer. As a general rule no attestation should be required; but it will be in the discretion of the Court in any particular case to require it, as, for example, where a second summons has to be issued, under Section 112, in consequence of there being no satisfactory proof of the first having been duly served. *Vide* remarks upon Section 111."

SECTION 55.

When the defendant cannot be found, and there is no agent empowered to accept the service, nor any other person on whom the service can be made, the serving officer shall fix the copy of the summons on the outer door of the house in which the defendant is dwelling; and if he is not dwelling in the place mentioned in the summons, the serving officer shall return the summons to the Court from whence it issued, with an endorsement thereon that he has been unable to serve it. Provided that, if the serving officer is informed that the defendant is to be found or has his dwelling in a place within the jurisdiction of the Court other than that indicated in the summons, the officer may proceed to that place to serve the summons.

If the summons cannot be served, a copy shall be affixed to the door of the dwelling-house.

If defendant do not dwell in the place mentioned, the summons shall be returned, with an endorsement of non-service.

Proviso.

It will be seen that, by this Section, a material improvement has been introduced on the former practice. In almost every instance the defendant avoided the service of summons, as by that means he could retard the progress of the case until after the proclamation was issued. This delay is materially lessened by the provisions of this Section. In the first instance the summons can hardly fail to be served. It is served either upon the defendant or his agent,

or on a male adult in his house; failing these, it is affixed to the outer door of his house at the place indicated in the summons. If the defendant can be found elsewhere within the jurisdiction, or if his dwelling be in a place other than that mentioned in the summons, the summons may be served in that place, or affixed to his house in that place, although not mentioned in the summons.

SECTION 56.

If served, time and manner of service to be endorsed on summons.

The serving officer shall, in cases in which the summons has been served, endorse on the original summons, or on a copy thereof under the seal of the Court, the time when and the manner in which it was served.

SECTION 57.

When a summons is returned unserved, Court to order substituted service, if satisfied that the defendant is avoiding service.

When a summons is returned to the Court without having been served, if the plaintiff shall satisfy the Court that there is reasonable ground for believing that the defendant is keeping out of the way of its officer for the purpose of avoiding the service of the summons, the Court shall order the summons to be served by fixing up a copy thereof upon some conspicuous place in the Court-house, and also upon the door of the house in which the defendant shall have last resided, if it be known where he last resided: or that the summons shall be served in such other manner as the Court shall think proper. And the service, which shall be substituted by order of the Court, shall be as effectual to all intents and purposes as if it had been effected in the manner above specified.

This Section contains a provision for cases where all the means contemplated by Section 55 fail. After pointing out the last process to be adopted, it leaves a wide discretion with the Court to see the summons served in such other manner as it shall think proper.

Held by the Madras Sudder Court, 1st October 1860: "If a defendant be out of the way on account of business, or on any *bonâ fide* ground, the suit against him should stop; but if the plaintiff be able to satisfy the Court that the defendant's absence is fraudulent, a special service should be substituted for the one ordinarily provided."

SECTION 58.

When service is substituted, the time for appearance to be fixed.

Whenever service shall be substituted by order of the Court by virtue of the power contained in the last preceding Section, the Court shall fix such time for the appearance of the defendant as the case may require.

This is a provision for suiting the date to the time and circumstances under which the summons may be served under the preceding Section.

SECTION 59.

How the summons is to be served when the defendant is resident within the jurisdiction of another Court, and has no agent to accept service.

If the defendant be resident within the jurisdiction of any Court other than that in which the suit is instituted, and have no agent empowered to accept the service, the Court in which the suit is instituted shall transmit the summons, either by an officer of the Court or by post, to any Court having jurisdiction at the place where the defendant resides, by which it can be most conveniently served, and shall fix such time for the appearance of the defendant as the case may require; and the Court to which the summons is transmitted shall, upon receipt of the summons, deliver the same to the nazir or other proper officer of such Court, to be served in the manner above directed; and upon the return of the summons by the serving officer, it shall be re-transmitted to the Court from whence it originally issued.

This is exactly in conformity with the practice as it formerly stood. This Section applies in the case of a defendant who, though beyond the jurisdiction of the Court where the suit is pending, resides within that of some other Court by means of which the summons can be served on him.

Held by the Madras Sudder Court, 1st October 1860: "Judicial *processes*, requiring to be executed within another jurisdiction, are to be forwarded by post, at the expense of the parties on whose motion they are issued, whether the Court issuing them is or is not authorised by law to frank covers. But no such process is to be issued until the party provides the requisite postage stamps, both for its transmission and return, in addition to the regulated charge for serving the process.

"District Moonsiffs may transmit processes direct to any Civil Court, for service by that Court, and also to any other Court without the intervention of any Civil Court. Provided, however, that where a District Moonsiff has to procure service of a process on an officer or soldier, or on a person residing within the limits of the jurisdiction of the Supreme Court, he is to forward the process through the Civil Judge.

"All *correspondence* between the Moonsiffs and other public authorities, whether within the same zillah or otherwise, is to be carried on through the Civil Judge. Provided that, in matters either trivial or emergent, a District Moonsiff may correspond direct with any local authority.

"It is not the province of the Courts to assist a suitor in the transaction of his business in the Collector's office.

No correspondence with the revenue authorities, therefore, will be necessary respecting the issue of *puttahs* to whom lands may have been decreed."

SECTION 60.

How the summons is to be served when the defendant resides out of the British territories in India, and has no agent to accept service.

Time for appearance.

In case of non-appearance of defendant, Court may direct suit to proceed subject to conditions.

If the defendant be resident out of the British territories in India, and have no agent empowered to accept the service, the summons shall be addressed to the defendant at the place where he may reside, and forwarded to him by post: in such case the time for the appearance of the defendant shall be regulated by the time which may be required for communication by post between the place at which the Court is held, and the place where the defendant resides; and if, on the day fixed for the hearing of the suit, or on any day to which the hearing may be adjourned, the defendant shall not appear in person or by pleader, the plaintiff may apply to the Court, and it shall be lawful for the Court to direct that the plaintiff shall be at liberty to proceed with this suit in such manner and subject to such conditions as to the Court may seem meet.

This Section applies to the case of a defendant residing beyond the British territories in India. Formerly a suit could not be entertained against a party who had proceeded to England, on account of inability of the Court to serve the summons and other process upon him. This difficulty has been removed by the provisions of this Section. The Court should take care that the time given to the defendant in such cases is sufficient for his appearance.

SECTION 61.

In suits for immovable property, service may in certain cases be made on agent in charge of such property.

When the suit is for land or other immovable property, and the summons for any reason cannot be served on the defendant in person, and the defendant has no agent empowered to accept the service, the summons may be served on any agent of the defendant in charge of such land or other immovable property.

This Section supplies a palpable defect in the former practice of the Civil Courts. In suits for land, or other immovable property, service on the agent of the defendant in charge of such property, on failure of other modes of service, ought to be reckoned as good service.

SECTION 62.

How service may be made on Government servants.

Service on officers and soldiers.

When the defendant is in the service of the Government, the Court may transmit a copy of the summons to the head officer of the office in which the defendant is employed, for the purpose of being served on him, if it shall appear to the Court that the summons may be most conveniently so served. If the defendant be an

officer or soldier, the Court shall transmit a copy of the summons to the commanding officer of the corps to which the defendant belongs, for the purpose of being served on him. The officer to whom the summons is transmitted, after causing the summons to be served on the person to whom it is addressed, if practicable, shall return it to the Court with the written acknowledgment of such person endorsed thereon. If from any cause the summons cannot be served upon the person to whom it is addressed, it shall be returned to the Court by which it was transmitted, with information of the cause which has prevented the service. In such case the Court shall adopt such other means of serving the summons as it may deem proper.

The provision of this Section applies to officers in the service of Government. After pointing out the particular mode of procedure, this Section gives the same latitude of discretion to the Courts, as is given by Section 57.

SECTION 63.

Service on a Corporation or Company.

When the suit is against a Corporation or a Company authorised to sue and be sued in the name of an officer or trustees, the summons may be served by leaving the same at the registered office (if any) of the Company, or sending it through the post office by a letter addressed to such office, or by giving it to any director, secretary, or other principal officer of the Corporation or Company.

SECTION 64.

In what case letter may be substituted for summons.

Nothing contained in the preceding rules shall be construed to prevent the Court from substituting for the summons a letter or other appropriate communication under the signature of the Judge and seal of the Court, when the person whose appearance is required is of a rank which entitles him to such mark of consideration. The letter or other communication shall contain all the particulars required to be stated in the summons and shall be treated in all respects as a summons.

This is a new, and, at the same time, a very wholesome provision. It will, no doubt, be attended with very favorable results, and in a great measure conciliate persons of high rank and station to the British Government, and greatly allay the irritation which arose from their being brought down, contrary to the custom of the former Governments, to a level with the commonalty in their communications with the judicial officers. The Rajah of Burdwan, it is believed, is addressed by means of a proceeding (roobukaree). This Section is an enlargement of the provisions of Section 22.

SECTION 65.

Service how to be made in such case.

When a letter or other communication is substituted for a summons under the authority of the last preceding Section, it may be transmitted through the post office, or by a special messenger selected by the Court, or in

any other manner which the Court may deem sufficient; unless the party shall have an agent empowered to accept service of judicial process, in which case delivery to such agent shall be deemed sufficient service.

This is a necessary provision to give effect to the preceding Section. Were the letters served on persons of rank, like summonses, the object of the law would be defeated. They are to be served through the post, or by a special peon of the Court, as ordinary public letters are delivered, *i. e.* enclosed in envelopes directed to the parties.

SECTION 66.

Proof of due service and delivery of summons, letter, &c., transmitted through the post.

Whenever it is provided that any summons, letter, or other communication may be transmitted to the person to whom it is addressed through the post office, proof that the same was correctly addressed to such person at his place of residence, and that it was duly posted and registered according to Section 38 of Act XVII. of 1854, *(for the management of the post office, for the regulation of the duties of postage, and for the punishment of offences against the post office)*, shall be sufficient proof of the due service and delivery of the summons, letter, or other communication, in the absence of evidence to the contrary.

Of Suits against Government and Public Officers.

SECTION 67.

In suits against Government, summons to be served on Government pleader.

Appearance and answer.

If the suit be against the Government, the summons shall be served on the Government pleader. The Court, in fixing the day for the Government to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channels, and for the issue of instructions to the Government pleader to appear and answer on behalf of the Government, and may extend the time at its discretion on the application of the Government pleader. The Court may also, if it think proper, direct the attendance of a person who may be able to answer all material questions relating to the suit.

There being no Government pleader in any moonsiff's court, and suits being there rarely instituted against the Government, the Madras Sudder Court ruled, 17th January 1860, that, when necessary, the summons may be served on the Government pleader of the Zillah Court.

In this Presidency, one of the pleaders in every moonsiff's court is generally appointed to conduct suits for or against the Government, whenever there may be any such.

SECTION 68.

In suits against Government officers for alleged official acts, summons to be served on them.

If the suit be against an officer of the Government for an act which the plaintiff alleges to have been done by such officer in his official capacity, the summons shall be served upon such officer in the manner hereinbefore provided.

SECTION 69.

Court may grant extension of time to enable officer to make a reference to Government.

If the officer, on receiving the summons, shall consider it proper to make a reference to Government before answering to the plaint, he may move the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channels; and the Court, upon such motion, may extend the time for so long as shall appear to it to be requisite.

SECTION 70.

If the Government undertake defence, Government pleader to appear and move that a note of his appearance be entered in the register.

If the Government shall undertake the defence of the suit, the Government pleader shall be furnished with authority to appear and answer to the plaint; and, upon motion made by him, the Court shall order a note to that effect to be entered in the register.

As suits may be instituted against Government, or any of its public officers in his official capacity, these Sections lay down the rules to be observed in either case. The provisions of these Sections alter the former practice in regard to suits against the Governments of Bengal and Bombay. A plaint was not admitted until intimation was received from the superior executive officers of their intention to defend the suit. The change made by this Code is undoubtedly more consistent with recognised judicial usage. In allowing time under Sections 67 and 69, the Court should take into consideration the desire of Government and its officers to avoid litigation, if possible, by satisfying the plaintiff out of Court if his demands be just and equitable. Hence arises the multiplicity of references, from one department to another, which causes considerable delay. In suits against public officers a reference to Government is sometimes rendered necessary, to determine whether the suit shall be defended on account of Government, or by the public officer himself at his own cost.

SECTION 71.

If no such motion be made, case to proceed as in a suit between private parties.

But defendant not liable to arrest before judgment.

If such motion shall not be made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer to the plaint, the case shall proceed as in a suit between private parties, except that the defendant shall not be liable to arrest before judgment.

An exemption from arrest, before judgment, under Section 78, is provided for in case of Government servants, for evident reasons.

SECTION 72.

Defendant may in certain cases be exempted from personal appearance.

If in any such suit the Court shall require the personal appearance of the defendant, and the defendant shall satisfy the Court that he cannot absent himself from his duty without injury to the public service, the Court shall exempt him from such appearance, but he shall be liable to be examined in any way in which an absent witness may be examined.

How Persons not before the Court may be made Parties to a Suit.

SECTION 73.

Court may adjourn hearing, and direct that parties appearing to be interested in a suit shall be made parties to the suit.

If it appear to the Court, at any hearing of a suit, that all the persons who may be entitled to, or who claim some share or interest in, the subject matter of the suit, and who may be likely to be affected by the result, have not been made parties to the suit, the Court may adjourn the hearing of the suit to a future day, to be fixed by the Court, and direct that such persons shall be made either plaintiffs or defendants in the suit as the case may be. In such case the Court shall issue a notice to such persons, in the manner provided in this Act for the service of a summons on a defendant.

This provision is enacted to meet a plea of defect of parties. No plaintiff can be nonsuited under this Code.* The power given to the Court, to direct certain persons to be made either plaintiff or defendant in a suit, is a palpable improvement on the former practice of the Civil Courts. A plaintiff, at his option, could add to the number of the defendants by a supplement, with the leave of the Court; but there is no instance known, in which a co-plaintiff was admitted by order of the Court. It is, however, a wholesome provision, and will greatly tend to shorten litigation. For instance, in a suit for possession of land, by one out of a number of shareholders of an estate, against the proprietor of a conterminous estate, the Court may order the other shareholders to be made co-plaintiffs to settle the contention absolutely, as regards the interests of all, and thereby prevent further litigation by them. In like manner, the Court may order any person claiming an interest in the subject

* The following ruling of the Agra Sudder Court, in the case of Hafiz Wuzeer Ali and others *v.* Meer Khan, decided 19th March 1860, may here be inserted, though referring to Sections 29 and 35.

"Though the word *nonsuit* is not used in Act VIII. of 1859, the provisions contained in Sections 29—35 of the Act, give a discretionary power of rejecting a petition of plaint, without precluding a suit *de novo*. Such rejection virtually amounts to a *nonsuit*. The use of the latter term, therefore, held not to be necessarily inconsistent with Act VIII. of 1859."

matter of the suit to be made defendant. Parties so made co-plaintiffs or co-defendants will be bound by the terms of the decree, if that course appear proper to the Court. By parity of reasoning, the Court has the power to strike out any person from among the parties to the suit, if it think such a proceeding just and proper, to preserve the community of interests between the plaintiffs and defendants respectively. For instance, two out of three partners in a concern sue a party, and make the third partner a defendant for not joining them in a suit. The Court may in its discretion strike out the name of the third partner from among the defendants, and place him among the plaintiffs.

See remarks on Section 9.

Held by the Madras Sudder Court, 1st October 1860: "The Act does not admit of any supplemental plaint. It will be sufficient for the Court to note in its order the name and description of the person to be made a party, and to direct that a notice be issued to him accordingly."

Held by the same Court, 15th December 1860: "This Section requires no more than that those persons should be joined as defendants, whose claims are necessary to be taken into consideration before deciding on the *plaintiff's title*. It is the *latter only* which will form the subject of the decree. The Court should not *call upon a plaintiff* to include as defendants other claimants to the property sued for; the bringing in of fresh parties being entirely an act of the Court, as ruled in the Circular of the 1st October last."

Of Arrest before Judgment.

SECTION 74.

If in any suit, not being a suit for land or other immovable property, the defendant, with intent to avoid or delay the plaintiff, or to obstruct or delay the execution of any decree that may be passed against him, is about to leave the jurisdiction of the Court, or has disposed of, or removed from the jurisdiction of the Court, his property or any part thereof, the plaintiff may, either at the institution of the suit, or at any time thereafter until final judgment, make an application to the Court that security be taken for the appearance of the defendant to answer any judgment that may be passed against him in the suit.

In suits for movable property, when defendant is about to leave the jurisdiction, &c., plaintiff may apply that security be taken.

The provisions of the Code, from this Section to Section 96, are intended as remedies in those cases in which the defendant attempts to avoid, delay, or obstruct the plaintiff

in the prosecution of his suit, or prevent the ultimate execution of the judgment he obtains. If carefully considered, these Sections will be found to meet all possible means of fraud; at the same time they contain provisions to prevent the plaintiff from using the powers given by them as a means of oppression or annoyance. The former law contained very scanty provisions on these points. These were contained in Sect. 4 and 5, Reg. II. of 1806, of the Bengal Code. The former provided security for appearance, and the latter that for satisfaction of judgment, and further laid down the rules for attachment. Those provisions were evaded with impunity. As arrest could not be made, without allowing the defendant sufficient time to find bail, he could timely remove himself from the jurisdiction if he wished. Then, again, a demand for security or attachment, under the latter Section, could only be made where the Court was satisfied that the defendant intended to dispose of his property or cause the public sale of any disputed land, or to remove any personal property from the jurisdiction of the Court, with a fraudulent motive. There are, however, various other ways by which the defendant may injure or waste the disputed property to the great injury of the plaintiff, the prevention of which was heretofore impossible. For instance, the defendant may cause a contested village to be depopulated. He may cut down or destroy trees, or other valuable permanent fixtures of an estate. These have been provided against by this Code.

Sections 74 and 80 treat of the arrest of defendant's person before judgment. This can take place only in suits other than for land or immovable property. When the suit is for land and its mesne profits, arrest may be applied for under this Section, as the claim for the latter brings it within its meaning. No distinction is made in regard to the application of Section 80, which refers to all kinds of suits. It is probable that the provisions of these Sections will not be had recourse to largely. The Courts will, of course, exercise the power with great caution. When the demand for ample security, as provided for in Section 81, is met, there can hardly be any occasion for enforcing the provisions of these Sections. Parties in the predicament contemplated by Section 80 form an exception. They must be proceeded against as provided in Section 74 and the following Sections. To bring a party within the provisions

of Section 74, it will be necessary to show that the defendant is either about to go beyond the jurisdiction of the Court, or has disposed of some of his property, or removed some of it from its jurisdiction, and that for the purpose of defeating or delaying the plaintiff's claim. A defendant may go out of the jurisdiction of the Court, but to a place where its process can easily reach him. He may remove the whole or any part of his personal property without intending any loss to the plaintiff. It is for the Court, from examination of the applicant and other inquiries, to satisfy itself that the motive of the defendant clearly is to obstruct or delay the course of justice. The hardship of arresting the defendant in such a case may be avoided by his pleader or agent offering bail to the Court, under Section 75, or depositing a sum of money or other property, under Section 77.

When there is an intention or attempt to remove property, that case is provided for by Section 81.

Section 75.

Court may issue warrant to bring up defendant to show cause why he should not give bail.

If the Court, after examining the applicant and making such further investigation as it may consider necessary, shall be of opinion that there is probable cause for believing that the defendant is about to leave its jurisdiction with the intent of avoiding or delaying the plaintiff, or that he has disposed of, or removed from the jurisdiction of the Court, his property or any part thereof, with the intent to obstruct or delay the execution of any decree, it shall be lawful for the Court to issue a warrant to the proper officer, enjoining him to bring the defendant before the Court, that he may show cause why he should not give good and sufficient bail for his appearance.

The warrant will at once operate to bring in the defendant, if the plaintiff can, by his own statement and such other evidence as he may produce, satisfy the Court on the points mentioned in this and the foregoing Section. The defendant, when brought into Court, is to show cause against giving bail. During this time he remains in the custody of the Court. The word appl[redacted]t used in this Section must be considered to include his pleader, recognised agent, and any person qualified to give information on his behalf.

Section 76.

If defendant fail to show cause, Court may order him to give bail.

If the defendant fail to show such cause, the Court shall order him to give bail for his appearance at any time when called upon while the suit is pending, and until execution or satisfaction of any decree that may be passed against him in the suit; and the surety or sureties

shall undertake, in default of such appearance, to pay any sum of money that may be adjudged against the defendant in the suit, with costs. Any order made by the Court under the provisions of this Section shall be open to appeal by the defendant.

Appeal.

Bail is to be demanded from the defendant if he fail to show sufficient cause against it. The defendant only has a right of appeal against such order. Under the former practice the plaintiff could also appeal if the order was adverse to him.

SECTION 76*a*.

[Section 24, Act XXIII. of 1861.]

The sureties for the appearance of any person, under Section 76 of the said Act VIII. of 1859, may at any time apply to the Court, in which they became such sureties, to be discharged from their engagements. On such application being made, the Court shall summon such person to attend, or, if it shall think fit, may issue a warrant in the first instance for his appearance. On the appearance of such person pursuant to the summons or warrant, or on his voluntary surrender, the Court shall direct the recognisances of the sureties to be discharged, and shall call upon such person to find other sureties, and thereupon proceedings shall be had under Sections 77 and 78 of the said Act.

Procedure in case of application by sureties to be discharged.

SECTION 77.

Should a defendant offer, in lieu of bail for his appearance, to deposit a sum of money or other valuable property sufficient to answer the claim against him, with the costs of the suit, the Court may accept such deposit.

Deposit in lieu of bail.

SECTION 78.

In the event of the defendant neither furnishing security nor offering a sufficient deposit, he may be committed to custody until the decision of the suit, or, if judgment be given against the defendant, until the execution of the decree, if the Court shall so order.

Defendant to be committed to custody if he cannot give security.

An appeal against the order passed under this Section is unnecessary, as the object will be gained by the appeal under Section 76.

SECTION 79.

If it shall appear to the Court that the arrest of the defendant was applied for on insufficient grounds, or if the suit of the plaintiff is dismissed, or judgment is given against him by default or otherwise, and it shall appear to the Court that there was no probable ground for instituting the suit, the Court may (on the application of the defendant) award against the plaintiff in its decree such amount, not exceeding the sum of one thousand rupees, as it may deem a reasonable compensa-

Compensation to defendant arrested on insufficient grounds.

tion to the defendant for any injury or loss which he may have sustained by reason of such arrest. Provided that the Court shall not award a larger amount of compensation under this Section than it is competent to such Court to decree in an action for damages. An award of compensation under this Section shall bar any suit for damages in respect of such arrest.

Proviso.

This is a new but a wholesome provision, to restrain the plaintiff from oppressing or annoying the defendant. Great care should be taken in exercising the power given by this Section; and it can only be exercised on the application of the defendant, and not by the Court *motu suo*, as the defendant is thereby barred from bringing any future action for damages. The mere dismissal of a plaintiff's suit for default or otherwise will not justify the Court in awarding compensation under this Section. The Court must be satisfied, before it decrees compensation, that there was no probable ground for the institution of the suit, or that the arrest was applied for on insufficient grounds. The provision of this Section was enacted to avoid the institution of a fresh suit for damages by the defendant against the plaintiff, should the defendant claim any.

SECTION 80.

If in any suit the defendant is about to leave the British territories in India, with intent to remain absent so long that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant, the plaintiff may make an application to the Court to the effect and in the manner aforesaid, and the procedure thereupon shall be in all respects the same as hereinbefore provided.

When the defendant is about to leave British India, the application to be made to the Court.

See remarks on Section 74.

Of Attachment before Judgment.

SECTION 81.

If the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of his property or any part thereof, or to remove any such property from the jurisdiction of the Court where the suit is pending, the plaintiff may apply to the Court, either at the time of the institution of the suit or at any time thereafter until final judgment, to call upon the defendant to furnish sufficient security to fulfil any decree that may be passed against him in the suit, and, on his failing to give such security, to direct that any property, movable or immovable, belonging to the defendant, shall be attached until the further order of the Court.

In what cases plaintiff may apply before judgment for security from defendant to fulfil decree, and, in default, for an attachment of defendant's property.

A provision corresponding with that in Section 71. It applies to attachment before judgment.

SECTION 82.

Application how to be made.

The application shall contain a specification of the property required to be attached, and the estimated value of each article or item thereof; and the plaintiff shall, at the time of making the application, declare that the defendant is about to dispose of or remove his property with such intent as aforesaid.

The application shall be accompanied by a declaration in writing, signed and verified by the plaintiff, that the defendant is about to dispose of or remove his property, with such intention as is mentioned in the preceding Section. A plaintiff making a false declaration is liable to punishment according to Section 24.

SECTION 83.

On the Court's being satisfied, warrant to be issued for security, &c., or for attachment.

If the Court, after examining the applicant and making such further investigation as it may consider necessary, shall be satisfied that the defendant is about to dispose of or remove his property, with intent to obstruct or delay the execution of the decree, it shall be lawful for the Court to issue a warrant to the proper officer, commanding him to call upon the defendant, within a time to be fixed by the Court, either to furnish security in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property, or the value of the same, or such portion thereof as may be sufficient to fulfil the decree, or to appear and show cause why he should not furnish security. The Court may also in the warrant direct the attachment until further order of the whole or any portion of the property specified in the application.

After the Court is satisfied upon the application of the plaintiff, the defendant is to be called upon to furnish security, or show cause, within a reasonable time to be fixed by the Court, with reference to the amount of security and the circumstances of the parties, &c. To prevent the defendant, however, from removing or disposing of his property during the interval before the actual attachment, the Court may order attachment at once, if it think necessary, during the time allowed to the defendant to furnish security. The plaintiff himself need not be examined. His pleader, recognised agent, or other person on his behalf, may be examined if cognisant of the facts.

The difference between the provisions of this and the following Section and those of Section 92, has been clearly noted in the Calcutta Sudder Court's decision of the 21th December 1859.

These two Sections apply to property not in suit, alienation of which is apprehended. Section 92 is applicable to property in suit, and contemplates the probability of waste, damage, or alienation thereof.

SECTION 84.

If the defendant fail to show such cause or to furnish the required security within the time fixed by the Court, the Court may direct that the property specified in the application, if not already attached, or such portion thereof as shall be sufficient to fulfil the decree, shall be attached until further order. If the defendant show such cause or furnish the required security, and the property specified in the application or any portion of it shall have been attached, the Court shall order the attachment to be withdrawn.

If cause be not shown or security be not furnished, property may be attached.

Withdrawal of attachment.

"If not already attached," *i. e.* attached under the last Clause of the preceding Section. If attached under that Section, then, instead of a fresh attachment, that attachment is to continue until the further orders of the Court.

The Madras Sudder Court ruled, 1st September 1860, that resistance to the processes of District Moonsiffs, (as for instance of attachment under this Section,) is punishable, as heretofore, under Section 5, Act XIX. 1855.

SECTION 85.

The attachment shall be made according to the nature of the property to be attached, in the manner hereinafter prescribed for the attachment of property in execution of a decree for money. Any order for the attachment of property under the preceding Section shall be open to appeal by the defendant.

How the attachment is to be made.

Appeal.

The rules of attachment are laid down in Sections 233 to 239. No appeal is allowed to the plaintiff. See, under Section 233, the Madras Sudder Court's rulings.

SECTION 86.

In the event of any claim being preferred to the property attached before judgment, such claim shall be investigated in the manner hereinafter prescribed for the investigation of claims to property attached in execution of a decree for money.

Claims to property attached before judgment, how to be investigated.

The rules for investigation of claims to attached property are to be found in Sections 246 and 247. The investigation of claims mentioned in this Section was unknown in the former practice of the Court. Such claims were not entertained before. It is not expected that, on the

attachment of lands, or other immovable property, many claims of this nature will be preferred, as Section 89 provides that such attachment, before judgment, shall not affect the rights of persons not parties to the suit. In the attachment of movable property, it must needs be otherwise. The effect of attachment, in such case, being to divest the party of his possession, claims will be necessarily made to avoid seizure or dispossession.

SECTION 87.

In all cases of attachment before judgment, the Court which passed the order for the attachment shall at any time remove the same, on the defendant furnishing security, as above required, together with security for the costs of the attachment.

Attachment may be removed when security is furnished.

SECTION 88.

If it shall appear to the Court that the attachment was applied for on insufficient grounds, or if the suit of the plaintiff is dismissed, or judgment is given against him by default or otherwise, and it shall appear to the Court that there was no probable ground for instituting the suit, the Court may (on the application of the defendant) award against the plaintiff in its decree such amount, not exceeding the sum of one thousand rupees, as it may deem a reasonable compensation to the defendant for the expense or injury occasioned to him by the attachment of his property. Provided that the Court shall not award a larger amount of compensation under this Section than it is competent to such Court to decree in an action for damages. An award of compensation under this Section shall bar any suit for damages in respect of such attachment.

Compensation for attachment applied for on insufficient grounds, &c.

Proviso.

The remarks in Section 79 apply to this.

SECTION 89.

Attachments before judgment shall not affect the rights of persons not parties to the suit, nor bar any person, holding a decree against the defendant, from applying for the sale of the property under attachment in execution of such decree.

Attachment not to affect the rights of persons not parties to the suit, or bar the execution of decrees.

This is declaratory of the effect of attachment. The Civil Courts have all along acted on this principle.

SECTION 90.

If it shall appear to the Court, by whose order the property may have been attached before judgment, that there is reasonable ground for supposing that the decree, in satisfaction of which the sale of the property is applied for, was obtained by fraud or other improper means, the Court may refuse to allow the property to be sold in execution, if the decree be a

Court may stay the sale of property already under attachment, when execution of a decree fraudulently obtained is applied for.

decree of that Court; or, if it be a decree of another Court, may stay the proceedings for a reasonable time, to enable the plaintiff in the pending suit to adopt proceedings to set aside the decree.

This is very much like the circular of the Calcutta and Agra Sudder Courts, dated the 2nd February 1849, which empowers the Courts to refuse execution of decrees on ground of collusion. If the decree complained of was passed by the attaching Court, there can be no difficulty in stopping its execution. If it be a decree of another Court, the plaintiff before the attaching Court will be allowed time to apply to the Court which issues execution, or to institute a regular suit to set aside that decree or stay its further progress. In the mean time the attaching Court will stay proceedings in execution.

See the Agra Sudder Court's ruling on Section 364.

"Proceedings to set aside the decree." The Bombay Sudder Court, in reply to a reference from the Judge of Surat, held that, if any thing more than the setting aside of the order for execution be required, a new suit against the holder of the fraudulently obtained decree will be necessary.—The Madras Sudder Court ruled the same, 1st October 1860.

SECTION 91.

Special case in which party may be put in immediate possession of land, the subject of suit.

Whenever lands paying revenue to Government, or a tenure liable to summary sale under the provisions of Regulation VIII. of 1819 of the Bengal Code, *(to declare validity of certain tenures and to define the relative rights of zemindars, putnee talookdars, &c.)*, form the subject of a suit, if the party in possession of such lands or tenure shall neglect to pay the Government revenue, or the rent due to the proprietor of the estate, as the case may be, and a public sale shall in consequence be ordered to take place, the party not in possession shall, upon payment of the revenue or rent due previously to the sale (and with or without security, at the discretion of the Court), be put in immediate possession of the lands or tenure; and the Court in its decree may award against the defendant the amount so paid, with interest thereupon at such rate as to the Court may seem fit, or may charge the amount so paid with interest thereupon, at such rate as the Court may order in any adjustment of accounts which may be directed in the final decree upon the suit.

This is a most necessary and wholesome provision for the security of plaintiffs. By this Section, the rules contained in Section 9, Act I. of 1845, and the same provision of the present Sale Law (Section 9, Act XI. of 1859), have been introduced in this place. One material difference between them is, that where a suit for an estate or a putnee tenure

is pending, and the defendant fails to pay the revenue or the rent, the plaintiff is allowed by this Section to pay it *at any time before the sale.* The discretion of the Court, in this matter, will of course be exercised with reference to the nature of the case and circumstances attending the default. In a presumably clear case for the plaintiff, and when the default cannot be justified, the Court will not demand security. In other cases it will most likely not give possession without security. In suits where the plaintiff is unable to pay up the revenue or the rent due, and the probability of a sale for arrears is not immediate, the Court may appoint a receiver under the provisions of Section 92. A further provision is made in this Section for charging the money so paid by the plaintiff in the decree, or in the account between the plaintiff and defendant, if the suit involve an adjustment of accounts, as in case of redemption of mortgage.

Of Injunctions.

SECTION 92.

In any suit, in which it shall be shown to the satisfaction of the Court that any property, which is in dispute in the suit, is in danger of being wasted, damaged, or alienated by any party to the suit, it shall be lawful for the Court to issue an injunction to such party, commanding him to refrain from doing the particular act complained of, or to give such other orders for the purpose of staying and preventing him from wasting, damaging, or alienating the property, as to the Court may seem meet. And in all cases in which it may appear to the Court to be necessary, for the preservation or the better management or custody of any property which is in dispute in a suit, it shall be lawful for the Court to appoint a receiver or manager of such property, and, if need be, to remove the person in whose possession or custody the property may be from the possession or custody thereof, and to commit the same to the custody of such receiver or manager, and to grant to such receiver or manager all such powers for the management or the preservation and improvement of the property, and the collection of the rents and profits thereof, and the application and disposal of such rents and profits, as to the Court may seem proper. If the property be land paying revenue to Government, and it is considered that the interests of those concerned will be promoted by the management of the collector, the Court may appoint the collector to be receiver and manager of such land, unless the Government shall, by any general order, prohibit the appointment of collectors for such purpose, or shall in any particular case prohibit the appointment of the collector to be such receiver.

Cases in which an injunction to stay waste, &c., may be granted.

Or in which a receiver or manager may be appointed.

When the Collector may be appointed receiver.

See the concluding remarks under Section 83, as to the difference between the object of Sections 83 and 84 and that of this Section.

There was no provision before this for the appointment of receiver. The collector, under Section 5, Regulation II. of 1806, could only be put in possession of the landed property of the defendant pending the demand for and tender of security. Personal property could not be attached by actual seizure. The attachment was made by proclamation, the most ineffectual means of attachment. The provision of this Section applies to movable as well as immovable property in *dispute* in any suit. Under this Code, a plaintiff may apply either for arrest of the defendant's person or for attachment of *his property;* or he may apply, when the property in suit is in danger of being wasted, damaged, or alienated, for an injunction and receiver. This Section meets cases of waste or damage to the property in litigation. When a receiver is appointed, the property must be considered in charge of the Court. The general duties of a receiver appointed by the Court, to take charge of litigated property, are described by Bennett, as follows :—

"The general duty of a receiver may be defined to be to take possession of the estate and premises, or any other property, the subject matter of the dispute in the cause, in the room or place of the owner thereof, and, under the sanction of the Court, to do, where necessary, all *such acts of ownership*, as to the receipt of rents, compelling payment of them, managing and letting the lands and houses, and otherwise making the property as productive for the parties to be ultimately declared to be entitled thereto, as the owner himself could do, if he were in possession."

General or particular power may be given to a receiver by the Court.

Where public curators are appointed by the Government under Section 19, Act XIX. of 1841, probably the Civil Courts will appoint them as receivers. As it is expected that occasion will frequently arise for the appointment of receivers by the Civil Courts, Government, in course of time, will be induced to appoint public curators in different parts of the country. In the appointment of receivers, great care must be taken by the Courts to select competent and respectable men.

After the property has been attached, or an injunction against alienation issued to the defendant, all transfers made by him must be held invalid as against the plaintiff.

The Bombay Sudder Court remarked, 28th June 1860, that the provision "give such other orders as to the Court may seem fit" is a very comprehensive one, and will admit of a demand for security from the defendant, should it appear necessary.

Contrary to the former practice in cases of attachment before judgment, the collector by this Code can only take charge of estates paying revenue to Government.

The Calcutta Sudder Court held, 19th January 1860, that a party may apply for an injunction and the appointment of a receiver, where the estate is held by him ijmalee, *i. e.* jointly with another.

"29. The form of injunction under Section 92 will be as follows.

Court of the Principal Sudder Ameen, Zillah 24-*Pergunnahs.*

No. 220 of 1859.

RADHAMOHUN BANERJEE ..... *Plaintiff,*
versus
KHETTERMOHUN SHA ..... *Defendant.*

Suit for possession of 10*bs.* 2*cs.* of land, with houses and trees, in Mouzah Rampore, Pergunnah Myda.

Khettermohun Sha of Mouzah Rampore, Pergunnah Myda: Take notice.

Whereas it has been shown to the satisfaction of the Court, in this suit, that the property in dispute is in danger of being alienated by you, *or* (that you are about to damage the property in dispute by *cutting down the trees* or *removing the houses)*: Now, therefore, you are hereby commanded to refrain from *(doing the act complained of)*. Herein fail not.

Given under the seal and signature of the Court, this 21st day of August 1859.

Seal of Court. *Principal Sudder Ameen.*

"32. It will be observed that no specific penalty is attached to disobedience of an injunction under Section 92. In all cases, however, either of actual or threatened disobedience to the order of the Court, it can, if it think it necessary for the preservation or better management or custody of the property, appoint a receiver or give such other orders of a like character, for the prevention of waste

or alienation, as it may consider advisable."—*S. C. Cir. Or., 29th July* 1859.

SECTION 93.

In any suit for restraining the defendant from the committal of any breach of contract or other injury, and whether the same be accompanied with any claim for damages or not, it shall be lawful for the plaintiff, at any time after the commencement of the suit and whether before or after judgment, to apply to the Court for an injunction to restrain the defendant from the repetition or the continuance of the breach of contract or wrongful act complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right; and such injunction may be granted by the Court on such terms as to the duration of the injunction, keeping an account, giving security or otherwise, as to such Court shall seem reasonable and just; and, in case of disobedience, such injunction may be enforced by imprisonment in the same manner as a decree for specific performance. Provided always that any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

In suits to restrain breach of contract, &c.

Injunction to restrain repetition or continuance of breach.

Proviso.

This is a novel provision, but absolutely necessary in some cases. The operation of this Section is exemplified by the following instances. *A* brings a suit against *B* to try his right to a piece of land, and to restrain *B* from opening a road or canal through it. *C* sues *D* for the specific performance of a contract, whereby the latter engaged to sell to the former a house, and to restrain him from pulling down the house. *F* having cut down some out of a large number of trees on the land of *E*, the latter brings a suit against the former to establish his right to the trees. In all these and similar cases, the plaintiff may apply to the Court for an injunction to restrain the defendant from continuing the road or canal, pulling down the house, or cutting down the trees.

An injunction can be applied for, after judgment, in terms of this Section. As for instance, when *A* has obtained a decree in respect of the performance of any particular ceremony in a certain family, of which he is declared to be the family priest, and not *B* the defendant, who is not entitled to perform such ceremony, *A* can apply to the Court after judgment, whether under appeal or otherwise, to restrain *B* from performing other ceremonies of a like nature in the same family. Where a certain turn of worship of an idol is decreed to the plaintiff, he can, after judgment as to that particular turn, apply for an injunction against the defend-

ant, to restrain him from interfering with any act flowing from the right so decided, though not specifically mentioned in the terms of the decree. When an injunction is granted under this Section, the Court is to impose such conditions, as to costs or otherwise, as it may deem necessary.

An injunction may be enforced by the imprisonment of the defendant. "An injunction may be discharged, or varied, or set aside by the Court," that is, the Court that issued the injunction.

"30. The heading of the injunction under Section 93 will be the same as the foregoing; but the preamble will be as follows."

Whereas application has been made to this Court, by Radhamohun Banerjee, plaintiff in the suit above mentioned, for an order to restrain you from [*the injury or breach complained of*]: Now, therefore, you are hereby commanded, on penalty of imprisonment, to refrain from repeating, *or continuing*, the act complained of, *or* [from committing any further breach of contract] *or* [injury,] arising out of the contract now being litigated in the suit above mentioned, *or* [with reference to the property or right] now under litigation in the above suit. You are also hereby commanded to keep true accounts for the Court's inspection of all sums, receipts and disbursements, in connection with the { contract / property / business } aforesaid; and you are warned that this injunction will continue in force from the 20th day of Assin 1266, [September 1859,] to the 1st of Magh 1266, [January 1860.]

Given under the seal and signature of the Court, this 21st day of August 1859.

Seal of Court. *Principal Sudder Ameen.*

"31. These forms must of course be varied to suit particular cases; but the general character of the forms should in all cases be preserved, and care should be taken that whatever the defendant is enjoined to refrain from doing should be expressed in clear and precise terms, so as not to admit of any doubt."—*S. C. Cir. Or., 29th July* 1859.

SECTION 94.

Any order made under either of the last two preceding Sections shall be open to appeal by the defendant.

Appeal.

The plaintiff cannot appeal.

SECTION 95.

Before granting injunction, Court may direct reasonable notice to be given to the opposite party.

The Court may, in every case, before granting an injunction, direct such reasonable notice of the application for the same to be given to the opposite party, as it shall see fit.

It is not intended that the Court shall in every case give notice to the defendant before issuing an injunction. The Courts probably will make it a general rule of giving notice before issuing injunctions. There may, however, be cases, the circumstances of which may admit of no delay in granting the injunctions. When the defendant has appeared by pleader or authorised agent, service of notice upon him would be sufficient. Where the defendant has not entered appearance, service is to be effected as in case of summons.

SECTION 96.

Compensation to defendant for needless issue of injunction.

Proviso.

If it shall appear to the Court that the injunction was applied for on insufficient grounds, or if the claim of the plaintiff is dismissed, or judgment is given against him by default or otherwise, and it shall appear to the Court that there was no probable ground for instituting the suit, the Court may (on the application of the defendant) award against the plaintiff in its decree such sum, not exceeding one thousand rupees, as it may deem a reasonable compensation to the defendant for the expense or injury occasioned to him by the issue of the injunction. Provided that the Court shall not award a larger amount of compensation under this Section than it is competent to such Court to decree in an action for damages. An award of compensation under this Section shall bar any suit for damages in respect of the issue of the injunction.

The provisions of this Section correspond with Sections 79 and 88. *Vide* remarks on those Sections.

When an injunction is granted after judgment, the contingencies contemplated by this Section, with reference to a pending suit, do not arise.

Of the Withdrawal and Adjustment of Suits.

SECTION 97.

Court may allow plaintiff to withdraw from a suit, with liberty to bring a fresh suit.

If the plaintiff at any time before final judgment satisfy the Court that there are sufficient grounds for permitting him to withdraw from the suit, with liberty to bring a fresh suit for the same matter, it shall be competent to the Court to grant such permission, on such terms as to costs, or otherwise, as it may deem proper. In any such fresh suit the plaintiff shall be bound by the rules for the limitation

of actions, in the same manner as if the first suit had not been brought. If the plaintiff withdraw from the suit without such permission, he shall be precluded from bringing a fresh suit for the same matter.

Under the former practice of the Courts, except when a case was dismissed by default under Act XXIX. of 1841, the plaintiff, withdrawing his suit by *dustburdaree*, was not debarred from bringing a new suit for the same cause of action. This Section gives the Court the power of allowing withdrawal with the privilege of bringing a fresh suit. This power, it is to be presumed, will be sparingly exercised. Cases may arise in which the Court may think fit to allow the plaintiff to withdraw. For instance, after institution of a suit, if the plaintiff find that he has mistaken his remedy, or that the only witness who can prove his case leaves the country without any certainty of his returning soon, and, on account of the distance or other cause, he cannot be examined by a commission, the Court may allow him to withdraw the suit, with power to *revive* it within the period of limitation. It should be observed that the time during which the first suit was pending cannot be deducted in reckoning limitation. If the case be withdrawn without such sanction of the Court, there can be no revival.

See observations on Section 358.

Held by the Bombay Sudder Court, 28th June 1860: "When the Court becomes aware that a plaintiff has withdrawn from a suit without permission, a minute should be recorded. When withdrawal is permitted, a note on the back of the plaint, showing the order given and the 'terms as to costs,' will be sufficient."

SECTION 98.

Adjustment or compromise.

Court may grant certificate for refund of stamp duty on plaint, if suit be adjusted.

Proviso.

If a suit shall be adjusted by mutual agreement or compromise, or if the defendant satisfy the plaintiff in respect to the matter of the suit, such agreement, compromise, or satisfaction shall be recorded, and the suit shall be disposed of in accordance therewith. On the application of the plaintiff reciting the substance of such agreement, compromise, or satisfaction, the Court, if satisfied that such agreement, compromise, or satisfaction has been actually entered into or made, shall grant a certificate to the plaintiff, authorising him to receive back from the collector the full amount of stamp duty paid on the plaint if the application shall have been presented before the settlement of issues, or half the amount if presented at any time after the settlement of issues and before any witness has been examined. Provided, however, that no such certificate shall be granted if the adjustment between the parties be such as to require a decree to pass, on which process of execution can be taken out.

This Section enacts, with greater precision, the rules already existing relating to the adjustment of suits by consent of parties. An order for refund of costs of stamp will be given only when the Court is satisfied that a real adjustment or compromise has taken place. The full amount is returnable, if the case be withdrawn before the issues are settled; after that, half will be returnable, if no witness shall have been examined.

Held by the Madras Sudder Court, 1st October 1860: "If the date fixed in a summons for the appearance of the defendant be for the final disposal of a suit, and the suit be compromised before such date, the plaintiff will be entitled to receive back the full amount of stamp duty paid on the plaint. Refund of stamp duty can only be made on the adjustment or compromise of original suits, and not in appeals."

Held by the same Court, 1st May 1861; "If an *appeal* be privately adjusted, the deed of adjustment must be put in by the parties in the Court in which such appeal is pending.

See the Madras Sudder Court's ruling, dated 13th March 1860, (under Section 358,) as to the inapplicability of the provision of this Section, regarding refund of stamp duty, to appeals withdrawn by agreement.

Of the Death, Marriage, and Bankruptcy or Insolvency of Parties.

SECTION 99.

The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survive.

Suit not to abate by death in certain cases.

The question of representation on the death, marriage, insolvency, or withdrawal of a party to the suit, was in a most unsatisfactory state under the old law. No distinct rules were laid down; and the decisions of the highest Court were conflicting. At one time it was held that, if one of several plaintiffs or appellants died unrepresented or withdrew from the suit or appeal, the remaining plaintiffs or appellants could not prosecute the case. The provisions of Sections 99 to 106 are intended to supply the defect in the former law. These will be found to meet all possible contingencies. The survival of the cause of action in this Section means its survival to other plaintiffs or defendants, or the respective representatives of plaintiff or defendant.

SECTION 100.

Proceeding in case of death of one of several plaintiffs or defendants, if the cause of action survive.

If there be two or more plaintiffs or defendants, and one of them die, and if the cause of action survive to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, and against the surviving defendant or defendants.

The cause of action of a deceased plaintiff survives to the surviving plaintiff. For instance, four members of a partnership bring a suit, and one dies; the cause of action survives to the others. Where the daughter of a Hindoo and her son are plaintiffs in a suit as reversioners, on the death of the daughter, her cause of action will survive to her son.

The cause of action, in the same way, will survive against a surviving defendant. For instance, in a lease or bond given by the defendants jointly, on the death of one of them, the cause of action will survive against the others.

SECTION 101.

Proceeding in case of death of one of several plaintiffs, where the cause of action accrues to the survivor and the representative of the deceased.

If there be two or more plaintiffs, and one of them die, and if the cause of action shall not survive to the surviving plaintiff or plaintiffs alone, but shall survive to them and the legal representative of the deceased plaintiff jointly, the Court may, on the application of the legal representative of the deceased plaintiff, enter the name of such representative in the register of the suit in the place of such deceased plaintiff; and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs and such legal representative of the deceased plaintiff. If no application shall be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the suit shall proceed at the instance of the surviving plaintiff or plaintiffs; and the legal representative of the deceased plaintiff shall be interested in and shall be bound by the judgment given in the suit, in the same manner as if the suit had proceeded at his instance conjointly with the surviving plaintiff or plaintiffs.

"If the cause of action shall not survive, &c.," as in the instance of several shareholders in an estate suing for their respective portions in the estate; if one die, his cause of action does not survive to the rest. If the legal representative of the deceased plaintiff do not apply to get his name registered as co-plaintiff, in the place of the deceased plaintiff, he will nevertheless be bound by the judgment given in the case. By parity of reasoning a suit will not abate by the withdrawal of one of several plaintiffs.

SECTION 102.

Proceeding in case of death of sole or sole surviving plaintiff.

In case of the death of a sole plaintiff or sole surviving plaintiff, the Court may, on the application of the legal representative of such plaintiff, enter the name of such representative in the place of such plaintiff in the register of the suit, and the suit shall thereupon proceed. If no such application shall be made to the Court, within what it may consider a reasonable time, by any person claiming to be the legal representative of the deceased sole plaintiff or sole surviving plaintiff, it shall be competent to the Court to pass an order that the suit shall abate, and to award to the defendant the reasonable costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased sole plaintiff or surviving plaintiff; or the Court may, if it think proper, on the application of the defendant, and upon such terms as to costs as may seem fit, pass such other order for bringing in the legal representative of the deceased sole plaintiff or surviving plaintiff, and for proceeding with the suit in order to a final determination of the matters in dispute, as may appear just and proper in the circumstances of the case.

According to the former practice of the Courts, the death of a party was notified to the Court by the other party or a pleader in the cause; whereupon the Court issued a proclamation, calling upon the heirs and other legal representatives to appear in the place of the deceased party. By this Code an order need not ordinarily be passed to bring in the representatives of a deceased plaintiff, whether the cause of action survive or not to the other *plaintiffs;* as the case would go on at the instance of the other plaintiffs, under the preceding Section. But where there is a sole plaintiff, or a sole surviving plaintiff, the defendant is at liberty to apply to bring in the legal representative of such deceased plaintiff. If the defendant do not apply, and the representative of the plaintiff do not appear within what the Court may deem a reasonable time, the suit will abate. If the defendant think it necessary for his interest to summon the representatives of the plaintiff, as for instance to remove a doubt cast on his title by the institution of a claim to it, or to recover his costs from the representatives personally, the process to be adopted in such a case is left to the discretion of the Court. If the representatives be indicated, a notice may be issued to them according to the rule laid down in Section 73. In general, the most approved mode is by issue of proclamation at the house of the deceased, as was usual before. It is expected that the application, referred to in the beginning of the Section, will be supported by some evidence that the applicant is entitled to represent the

deceased. But no inquiry on the point is called for, unless the right of the party appearing be disputed.

"Pass an order that the suit shall abate." Held by the Bombay Sudder Court, 28th June 1860: "No formal judgment and decree are necessary when a suit is held to have abated. The order passed may be endorsed on the plaint; and this disposal of the suit will, of course, appear in the Court's proceedings."

SECTION 103.

If any dispute arise as to who is the legal representative of a deceased plaintiff, it shall be competent to the Court either to stay the suit until the fact has been duly determined in another suit, or to decide, at or before the hearing of the suit, who shall be admitted to be such legal representative for the purpose of prosecuting the suit.

Proceeding in case of dispute as to who is the legal representative of a deceased plaintiff.

This Section enacts how the Court is to proceed when more than one claimant applies for representation. The process is much the same as was followed under the former practice. In doubtful cases the Court would allow two or more claimants to carry on a suit. There is no appeal from orders passed under this Section.

SECTION 104.

If there be two or more defendants, and one of them die, and the cause of action shall not survive against the surviving defendant or defendants alone, and also in case of the death of a sole defendant, or sole surviving defendant, where the action survives, the plaintiff may make an application to the Court, specifying the name, description, and place of abode of any person whom the plaintiff alleges to be the legal representative of such defendant, and whom he desires to be made the defendant in his stead; and the Court shall thereupon enter the name of such representative in the register of the suit in the place of such defendant, and shall issue a summons to him to appear on a day to be therein mentioned to defend the suit; and the case shall thereupon proceed, in the same manner as if such representative had originally been made a defendant and had been a party to the former proceedings in the suit.

Proceeding in case of death of one of several defendants, or of a sole or sole surviving defendant.

The procedure in the case of a defendant dying, must, from the nature of things, be different from that followed on the death of a plaintiff. The plaintiff is to intimate to the Court whom he intends to bring in as the legal representative of the deceased defendant. As the plaintiff takes the risk of selection, the Court has simply to adopt his nomination. The Court will issue a summons as in the case of an original defendant.

"Where the action survives," *i. e.* where the action does not determine by the death of a defendant, as in the case of an action on bond, where, though the defendant dies, the action survives and may be carried on against his legal representative. But if it be an action for damages, or for libel or defamation, the action will not survive the death of the defendant.

SECTION 105.

Marriage of a female plaintiff or defendant not to abate the suit.

The marriage of a woman, plaintiff or defendant, shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and the decree thereupon may be executed upon the wife alone; and if the case is one in which the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and in case of judgment for the wife, execution of the decree may, with the permission of the Court, be issued upon the application of the husband, where the husband is by law entitled to the money or thing which may be the subject of the decree.

This Section will rarely, if ever, apply to Hindoos or Mahomedans. It applies to persons whose cases are governed by English law.

SECTION 106.

Bankruptcy or insolvency when not to abate the suit.

The bankruptcy or insolvency of the plaintiff, in any suit which the assignee might maintain for the benefit of the creditors, shall not be a valid objection to the continuance of such suit, unless the assignee shall decline to continue the suit and to give security for the costs thereof within such reasonable time as the Court may order. If the assignee neglect or refuse to continue the suit and to give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy or insolvency of the plaintiff as a reason for abating the suit.

Suits carried on by any party may, on his insolvency, be carried on by the official assignee of the Insolvent Court, or any particular assignee of the insolvent. A new provision has been introduced in this Code regarding security for costs. The assignee will be required to give security for eventual costs before he is allowed to carry on the suit. If the defendant become insolvent, the suit of course will abate as against him, as, under the Insolvent Act, the insolvent's property of every description is vested in the official assignee, from the date of the vesting order. If the subject matter of the suit, however, be not inserted in his schedule, he is not insolvent in regard to that suit, which will proceed

against the defendant in the usual course. The plaintiff may apply to bring in the assignee in the place of the insolvent defendant, if any lands in the possession of the defendant (the subject of suit) have passed into the hands of the assignee, on the defendant's insolvency. So, in other cases, where the assignee's possession is subject to the incidents of the property claimed.

"33. It will be observed that the chapter on the death, marriage, and bankruptcy of parties (Section 99 and following Sections,) introduces a very important change into the procedure of our Courts. Hitherto, when a plaintiff or defendant died during the pendency of a suit, the suit itself was placed in abeyance, and it was necessary for the Judge to issue notices calling on the legal representatives of the deceased to appear. Under the new Code there need not, in the majority of cases, be any interruption to the suit, and it is left to the parties themselves to move the Court to substitute the name of the heir or representative for that of the deceased. There is no doubt that these provisions will prevent much of the delay which has hitherto occurred in the disposal of civil suits."—*S. C. Cir. Or., 29th July* 1859.

Of Notices to produce, and how they are to be served.

SECTION 107.

Two notices in writing to be delivered to the proper officer of the Court.

Whenever any of the parties to a suit is desirous that any document, writing, or other thing, which he believes to be in the possession or power of another of the parties thereto, should be produced at any hearing of the suit, and the production of such document, writing, or other thing has not previously been required, under the provisions of Sections 40 and 43, he shall, at the earliest opportunity, deliver to the Court two notices in writing to the party in whose possession or power he believes the document, writing, or other thing to be, calling upon him to produce the same; and one of such notices shall be filed in Court, and the other shall be delivered by the Court to the nazir or other proper officer to be served upon such party.

This Section is not limited to the application of the plaintiff against the defendant or *vice versâ*. A plaintiff or defendant may call upon his co-plaintiff or co-defendant to produce any document, writing, or other thing of which he requires the production. This is irrespective of the call made before the hearing under Sections 40 and 43. The production may be required at the first or adjourned or any other hearing of the suit, but it must be at the "earliest

opportunity," that is, at such a stage of the case that it may not appear to the Court to be merely a means of delaying the decision. "Other thing" means any thing in the nature of personalty which can be produced in Court.

"The other shall be delivered by the Court to the nazir, to be served." The Bombay Sudder Court held, 28th June 1860, that this notice "should bear the seal of the Court and the counter-signature of the Judge."

SECTION 108.

Service of notices and other judicial processes how to be made on a party who has not appointed a pleader to act for him.

In all cases in which a party to a suit has not appointed a pleader to act for him, all notices and other judicial processes shall be served upon such party in the manner hereinbefore provided for the service of a summons upon a defendant to appear and answer.

Where a party has appointed a pleader, or has a recognised agent, service of notices and all other judicial processes on him will be held good, as provided in Sections 17 and 18.

Of the Appearance of the Parties and Consequences of Non-Appearance.

SECTION 109.

Parties must appear in person or by pleader.

On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by a pleader; and the suit shall then be heard, unless the hearing be adjourned to a future day, which shall be fixed by the Court.

Adjournment must be formally recorded in a proceeding. "Attendance in person" includes that by a recognised agent under Section 16.

The Madras Sudder Court stated, 19th March 1860, in reply to a reference, that a defendant is entitled, under the general rules relating to the furnishing of copies, to obtain *at any time* a copy of the plaint, and, at the first hearing of the suit, to render a written statement of *his own case*, but that no *answer*, *i. e.* written replication, can be received from a defendant or respondent. No further time can be allowed for putting in such written statement (Section 122). The defendant may also be examined at the discretion of the Court, the substance of the examination being reduced to writing (Section 125).

The Bombay Sudder Court stated, 28th June 1860, in reply to a reference, "that the Act contains no provision

for requiring a written *answer* from a defendant, though, at the first hearing of the case, either party may tender a written statement, and this the Court must receive; and that the Court may also call for written statements at any time before final judgment, but that oral examination is to supply the place of the written answer in all other respects."

It was also held by that Court, on the same date: "No case should, before the day fixed for hearing, be taken up for the purpose of receiving an admission by the defendant *(kubool juwab)*. Some check will thus be given to the early obtaining of collusive decrees."

SECTION 110.

If, on the day fixed for the defendant to appear and answer, or any other day subsequent thereto, to which the hearing of the suit may be adjourned, neither party shall appear, either in person or by a pleader, when duly called upon by the Court, the suit shall be dismissed. Whenever a suit is dismissed under the provisions of this Section, the plaintiff shall be at liberty to bring a fresh suit unless precluded by the rules for the limitation of actions; or, if he shall, within the period of thirty days, satisfy the Court that there was a sufficient excuse for his non-appearance, the Court may issue a fresh summons upon the plaint already filed.

If neither party appear, suit to be dismissed, with liberty to the plaintiff to bring a fresh suit.

Or if sufficient excuse for non-appearance, a fresh summons may be issued.

This applies to a case in which, on the day fixed for, or on the adjourned day of hearing, neither the plaintiff nor the defendant appears, when the plaintiff's suit is to be dismissed. Applications can be made, within thirty days after dismissal, for reviving the case. The suit may be revived, if the Court be satisfied that there was sufficient excuse for the plaintiff's non-appearance. Under the former practice a suit or appeal dismissed on default could not be restored, unless the dismissal was owing to some unavoidable cause or neglect of the pleader (*vide* Act XVI. of 1845). That rule in some instances operated injuriously upon defaulting plaintiffs and appellants. By this Code the sufficiency of the excuse has been very wisely left to the discretion of the Court.

The Madras Sudder Court held, 17th January 1860, that the provision in Section 119, regarding judgments by default against plaintiffs, is inapplicable to the dismissal of suits under this Section.

SECTION 111.

If the plaintiff shall appear in person or by a pleader, and the defendant shall not appear in person or by a pleader, and it shall be proved to the satisfaction of the Court that the summons was duly served, the Court shall proceed to hear the suit *ex-parte*. If the defendant appear on any subsequent day to which the hearing of the suit is adjourned, and shall assign good and sufficient cause for his previous non-appearance, he may, upon such terms as the Court may direct as to payment of costs, or otherwise, be heard in answer to the suit, in like manner as if he had appeared on the day fixed for his appearance.

If plaintiff only appear, Court may proceed *ex-parte*, if due service of summons be proved.

If defendant appear on day of adjourned hearing, and assign good cause for his previous non-appearance, he may be heard.

Before proceeding *ex-parte*, the Court will be careful to see that the summons to the defendant was duly served. See remarks on Section 47. On this point, the Madras Sudder Court ruled, 19th March, 1860, that if not satisfied by the examination of the serving officer, the Court may direct a second summons to be served under Section 112, and, in particular cases, require that the service be made in the presence of witnesses.

Defendant's appearance in person includes his appearance by pleader or recognised agent. If the case taken up *ex-parte* be partly tried on the day fixed for hearing, and be postponed to a subsequent day, and the defendant appear before the latter day and show good and sufficient cause for his non-appearance on the first day of hearing, he may be heard in answer. If the plaintiff should have been put to costs in consequence of such default of the defendant, the Court will order such costs to be paid by the latter. For instance, a plaintiff may incur expenses in bringing his witnesses on the day fixed for the first hearing.

The payment of costs before the final decision of a suit is a new feature in the procedure of the Civil Courts. Such costs were allowed in the Supreme Court, and ascertained and enforced by what is called an *allocatur*. These costs should be given by an interlocutory order, and may be intermediately realised by execution, irrespective of the costs adjudged by the final judgment in the suit. There is no appeal by either party against an order allowing or disallowing a defendant to be heard under this Section. In trying a case *ex-parte*, the Court will hear the evidence the plaintiff brings forward in support of his case, contained in his plaint or written statement filed under Section 120, or as

may appear by the further examination of the plaintiff, if necessary, under Section 125.

"34. Under Sections 111 and 112, it will be seen that cases cannot be decided *ex-parte* until the Court be satisfied, either by the evidence of the parties serving the process, or other proof, that the summons has been duly served on the defendant, according to some one of the modes of service specified in the chapter on service of summons."—*S. C. Cir. Or., 29th July* 1859.

Held by the Bombay Sudder Court, 28th June 1860, that if a suit heard *ex-parte* under this Section do not admit of being decided at the first hearing, the points to be established ought to be laid down, but if otherwise, it is not necessary in the first instance to record the points to be proved.

SECTION 112.

If plaintiff only appear, and due service of summons be not proved, Court may order issue of second summons.

If the plaintiff shall appear in person or by a pleader, and the defendant shall not appear in person or by a pleader, and it shall not be proved to the satisfaction of the Court that the summons was duly served, in any of the modes of service hereinbefore provided, the Court may direct a second summons to the defendant to be issued in any of the said modes.

SECTION 113.

If plaintiff only appear, and service of summons be proved, but the service was not in due time, Court may adjourn hearing and direct notice to be given to defendant.

If the plaintiff shall appear in person or by a pleader, and the defendant shall not appear in person or by a pleader, and it shall be proved to the satisfaction of the Court that the summons was served on the defendant, but not in sufficient time to enable the defendant to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and may direct notice of such day to be given to the defendant.

SECTION 113 *a*.

[Sections 5, 6, and 7, Act XXIII. of 1861.]

Procedure on discovery, on the day fixed for defendant to appear and answer, that usual notice has not been served in consequence of failure of plaintiff to deposit the cost of issuing the same.

If on the day fixed for the defendant to appear and answer to a suit, it shall be found that the summons to the defendant has not been served in consequence of the failure of the plaintiff to deposit, within the time allowed, the sum required to defray the cost of issuing the summons, the Court may order that the suit be dismissed. Provided that no such order shall be passed, although the summons shall not have been served upon the defendant, if on the day fixed for

the defendant to appear and answer he shall have entered an appearance by a pleader, or by a duly authorised agent when he is allowed to appear by agent, or shall be in attendance in person.

See the concluding remarks under Section 41. The Sudder Courts were not agreed whether omission to pre-pay costs constituted a default, warranting the dismissal of the suit. This Section has been enacted to remove the doubt.

SECTION 113 *b*.

Provisions of last Section to apply to appeals also.

The provisions of the last preceding Section shall apply to appeals also.

SECTION 113 *c*.

Procedure in case of dismissal of suit under Section 5.

Whenever a suit is dismissed under the provisions of Section 5 of this Act, [Section 113*a*,] the plaintiff shall be at liberty to institute a fresh suit, unless precluded by the rules for the limitation of actions; or, if the plaintiff shall satisfy the Court, within the period of thirty days from the date of the order dismissing the suit, that there was a sufficient excuse for his not making the deposit required within the time allowed, the Court may order a fresh summons to issue upon the plaint already filed.

SECTION 114.

If defendant only appear, Court to pass judgment by default against plaintiff, unless defendant admit the claim.

No fresh suit after such judgment.

If the defendant shall appear in person or by a pleader, and the plaintiff shall not appear in person or by a pleader, the Court shall pass judgment against the plaintiff by default, unless the defendant admit the claim, in which case the Court shall pass judgment against the defendant upon such admission. When judgment is passed against a plaintiff by default, he shall be precluded from bringing a fresh suit in respect of the same cause of action.

Section 110 contemplated a case, in which both plaintiff and defendant were absent on the day of hearing. This Section applies to those cases in which the plaintiff is absent, but the defendant is present. The difference between these Sections is that, by the former, the plaintiff is at liberty to bring a fresh suit on the same cause of action; by this he is absolutely precluded. The privilege of revival, with leave of the Court, is however allowed to him by Section 119. The procedure laid down in Act XXIX. of 1841 had no reference to the appearance or non-appearance of the defendant. A dismissal under that law simply gave the plaintiff the option of bringing a new suit. By this Code privilege of revival is given to the plaintiff, whether the defendant appear or not; but he can bring a fresh suit only when both he and defendant have been absent.

SECTION 115.

When there are two or more plaintiffs, any one or more of them may be authorised to appear, plead, and act for the other or others of them: and in like manner, when there are two or more defendants, any one or more of them may be authorised to appear, plead, and act for the other or others of them; provided that the authority shall, in all cases, be in writing, and shall be filed in the Court; when so filed, it shall be as effectual to all intents and purposes as if the person so authorised to appear, plead, and act, were a pleader of the Court.

When there are several plaintiffs or defendants, each may authorise the other to appear for him.

This is a new provision, but well adapted for the convenience of the parties and despatch of business. A plaintiff or defendant may appoint his co-plaintiffs or co-defendants to appear and plead for him. When a party is so authorised, the power must be given to him by writing.

"As if the person so authorised to appear, plead, and act, *were a pleader*." Held by the Bombay Sudder Court, 28th June 1860, that one plaintiff or defendant cannot authorise another to appoint a pleader for him, which can be done only by a recognised agent, who, under Section 17, may do "any thing which by the Act is required or permitted to be done by the party in person."

SECTION 116.

If there are two or more plaintiffs, and one or more of them shall appear in person or by a pleader, or by a co-plaintiff duly authorised, and the other or others of them shall not appear in person or by a pleader, or by a co-plaintiff duly authorised, it shall be competent to the Court to proceed with the suit at the instance of the plaintiff or plaintiffs who shall have appeared, in the same way as if all the plaintiffs had appeared, and to pass such order as may be just and proper in the circumstances of the case; and if there are two or more defendants, and one or more of them shall appear in person or by a pleader, or by a co-defendant duly authorised, and the other or others of them shall not appear in person or by a pleader, or by a co-defendant duly authorised, the Court shall proceed with the suit to judgment, and shall, at the time of passing judgment, give such order, with respect to the defendant or defendants who shall not have appeared, as shall be just and proper in the circumstances of the case.

Consequence of non-appearance of one or more of several plaintiffs.

Consequence of non-appearance of one or more of several defendants.

Non-appearance of one or more plaintiffs or defendants, out of several, on the first or any subsequent hearing, will not stop the suits being proceeded with. But in the instance of the prosecution the Court may exercise a discretion, if moved to proceed by the plaintiffs present. The Court cannot proceed apparently in the absence of a plain-

tiff, except at the instance of the co-plaintiffs. In the case of a co-defendant being absent, the case will go on whether the defendants present wish it or not.

The Calcutta Sudder Court held, 30th January 1860, that, to a suit which was instituted, and in which the defendant wished to enter appearance, before the coming of this Code into operation, it was not competent to the Judge, hearing the application on the 1st July 1859, to apply the new Code.

SECTION 117.

Consequence of non-appearance, without sufficient cause shown, of any party to a suit summoned or ordered to appear in person.

If any plaintiff or defendant, who shall have been ordered or summoned to appear personally under the provisions of Section 42, shall not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, such plaintiff or defendant shall be subject to all the provisions of the foregoing Sections, applicable to plaintiffs and defendants respectively who do not appear either in person or by pleader.

Where a plaintiff or defendant is summoned to appear personally, the provisions of Sections 110 to 116, which refer to appearance by pleader or recognised agent, will apply.

SECTION 118.

Court to receive declaration in support of cause shown.

In support of the cause shown by a plaintiff or defendant for failure to appear in person, the Court shall receive any declaration in writing on unstamped paper, if signed by such plaintiff or defendant, and verified in the manner hereinbefore provided for the verification of plaints.

The declaration of excuses mentioned in this Section must be signed by the plaintiff or defendant, as the case may be, and verified by him in the manner prescribed by Section 27. The personal attendance of the party will not be necessary for this purpose.

SECTION 119.

No appeal from judgments passed *ex parte* or on default.

When and how judgment *ex parte* against a defendant may be set aside.

No appeal shall lie from a judgment passed *ex-parte* against a defendant who has not appeared, or from a judgment against a plaintiff by default for non-appearance. But in all cases in which judgment may be passed *ex-parte* against a defendant, he may apply, within a reasonable time, not exceeding thirty days after any process for enforcing the judgment has been executed, to the Court by which the judgment was passed, for an order to set it aside; and if it shall be proved to the satisfaction of the Court that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was called

on for hearing, the Court shall pass an order to set aside the judgment, and shall appoint a day for proceeding with the suit. In all cases of judgment against a plaintiff by default, he may apply within thirty days from the date of the judgment for an order to set it aside; and if it shall be proved to the satisfaction of the Court that the plaintiff was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the judgment by default, and shall appoint a day for proceeding with the suit. But no judgment shall be set aside on any such application as aforesaid, unless notice thereof have been served on the opposite party. In all cases in which the Court shall pass an order under this Section for setting aside a judgment, the order shall be final; but in all appealable cases in which the Court shall reject the application, an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable, provided that the appeal be preferred within the time allowed for an appeal from such final decision, and be written upon stampt paper of the value prescribed for petitions to the Court where a stamp is required for petitions.

When and how judgment by default against a plaintiff may be set aside.

No judgment to be set aside without notice to opposite party.

Order for setting aside judgment shall be final.

In appealable cases an appeal from order of rejection.

Proviso.

This Section contains a provision to prevent failure of justice in *ex-parte* decrees and dismissal by default respectively, as provided by Sections 111 and 114. The procedure laid down is based on the principle contained in Section 46, Regulation XXIII. of 1814, of the Bengal Code, with reference to appeals from *ex-parte* decrees passed by moonsiffs. The difference is, that an *ex-parte* decree will be set aside by the Court passing it, on proof that the summons was not duly served, or that the defendant, from other sufficient cause, was prevented from appearing. The judgment by default against plaintiff, under Section 114, is to be set aside on his showing sufficient cause for his non-appearance. Notice of application is to be given to the opposite party, before the judgment in either case can be set aside. This is to be done by service upon the pleader, or recognised agent, if any, or upon the party by way of summons. When the application under this Section is granted, there is no appeal. When it is rejected, a summary appeal will lie to the Court empowered to hear appeals from the decrees of that Court.

"No appeal shall lie from a judgment passed *ex-parte* against a defendant who has not appeared." The Madras Sudder Court ruled, 19th March 1860, that by Section 387 the right of appeal is reserved to defendants, in original suits pending at the time the Code came into operation, and subsequently decided *ex-parte*.

"Not exceeding thirty days after any process for enforcing the judgment has been executed." This provision was rendered necessary, in consequence of great oppression practised by parties by surreptitiously obtaining *ex-parte* decrees. In many cases the defendant had no knowledge of the suit till long after the date of decree, and only by the decree being put in execution, when, probably, it was too late to adopt preventive measures, owing to the law on this point having been very defective. This Code, therefore, gives the defendant ample opportunity of setting aside such a decree, within thirty days after the actual execution of any process, whether of attachment of his property or arrest of his person. Of course, the defendant is not precluded from taking such steps, if by any means he should previously come to the knowledge of such a decree having been passed against him.

"35. It will be understood that, even although the defendant does not appear, the plaintiff must prove his case to the satisfaction of the Court before he can obtain a decree. The defendant also, it will be observed, may apply for an order to set aside the *ex-parte* judgment at any period between the date of the judgment and the thirtieth day after process has been taken out for its enforcement." —*S. C. Cir. Or.*, 29*th July* 1859.

Of Written Statements.

SECTION 120.

The parties or their pleaders may tender, at the first hearing of the suit, written statements of their respective cases, and the Court shall receive the same and put them on the record. Such statements shall be written on the stampt paper prescribed for petitions to the Court where a stamp is required for petitions.

Written statements may be tendered by the parties at the first hearing of the suit.

Written statements to be on stampt paper.

It will be observed that by this Code all formal pleadings have been done away with, except the plaint. When the parties appear on the appointed day of hearing, the Court is to find out the real controversy between the parties by inquiries under Section 139, and examination of parties, if necessary, under Section 125. It will, however, be at the option of the parties, under this Section, to file written statements of their respective cases, verified in the manner of plaints under Section 27. These can be filed only at the first hearing of the case, and not at any subsequent stage, unless called for by the Court.

SECTION 121.

Particulars of set-off to be given in a written statement.

Abandonment of excess of set-off over claim.

If in a suit for debt the defendant desire to set-off, against the claim of the plaintiff, the amount of any debt due to him from the plaintiff, he shall tender a written statement containing the particulars of his demand, and the Court shall thereupon inquire into the same. Provided that, if the sum claimed by the defendant exceed the amount cognisable by the Court, the defendant shall not be allowed to set-off the same unless he abandon the excess.

A set-off can be claimed only in an action of debt and of a liquidated amount. The written statement under this Section must be in the nature and form mentioned in Sections 120 and 123. A set-off may be pleaded to the whole or part of the claim of the plaintiff. It may be claimed on the admission or denial of the plaintiff's demand in the suit, either wholly or partially. If a set-off be allowed and it be found to be in excess of the plaintiff's claim, the defendant will get a decree for the excess in the same suit, recoverable in the usual manner by execution as provided in Section 195.

A sues *B* for a debt of Rupees 200 in the moonsiff's court: the latter has a claim against the former for Rupees 400. *B* may claim a set-off against *A* by abandoning the excess of Rupees 100 over the amount cognizable by that Court. *B* may, instead of claiming a set-off, sue for the whole debt in a Court of competent jurisdiction. Where there are cross suits or decrees between the parties, the procedure laid down in Section 209 is to be followed.

"37. The only case in which a defendant is compelled to put in a written statement without the order of the Court is, where he desires to set-off a claim of his own against the debt claimed by the plaintiff. In other cases, it is discretionary with him to file a written reply or not, as he thinks proper."—*S. C. Cir. Or., 29th July* 1859.

"The Revenue Courts are not competent to investigate pleas of set-off, when the accounts, which include the items on which set-off is claimed, have not been previously admitted by plaintiff, or when the matter of the set-off involves inquiries beyond the restricted jurisdiction of those Courts." Calcutta Sudder Court's decision, 5th October 1861, in a regular appeal from a decision under Act X. 1859.

SECTION 122.

No written statement to be received after first hearing, unless called for by the Court.

Court may at any time call for a written statement.

No written statement shall be received after the first hearing of the suit, unless called for by the Court. But it shall be competent to the Court, at any time before final judgment, to call for a written statement, or an additional written statement from any of the parties. When such statements are called for by the Court, they shall be received on plain paper.

When no written statement has been filed, the Court may call for one, and where a written statement has already been filed by the party himself, the Court may call for an additional statement; but in both cases the statement called for by the Court will be on plain paper.

"38. The Court has the power of calling for written statements in all cases, where it may consider it necessary to do so.

"39. But this power should only be exercised, as a general rule, where the case is complicated, or defendant is not present in person.

"40. It should be carefully borne in mind that all written statements must be subscribed and verified by the parties themselves, or the competent persons referred to in paragraph 9, and that any wilful falsehood contained in these statements subjects the subscriber to a prosecution for perjury."—*S. C. Cir. Or., 29th July* 1859.

SECTION 123.

How written statements are to be framed.

Written statements to be subscribed and verified.

Written statements shall be as brief as the nature of the case will admit, and shall not be argumentative, nor by way of answer one to the other; but each statement shall be confined, as much as possible, to a simple narrative of the facts which the party, by whom or on whose behalf the written statement is made, believes to be material to the case, and which he believes he will be able to prove if called upon by the Court. Written statements shall be subscribed and verified, in the manner hereinbefore provided for subscribing and verifying plaints; and no written statement shall be received unless it be so subscribed and verified.

The undermentioned examples in the Appendix will illustrate this Section, *viz.*:—

Written statement on behalf of plaintiff.

Written statement on behalf of defendant.

SECTION 124.

Court may reject a written statement which is argumentative, prolix, or irrelevant.

If it shall appear to the Court that any written statement presented by or on behalf of a party, whether the same have been spontaneously tendered or have been called for by the Court, is argumentative or unnecessarily prolix, or that it contains matter irrelevant to the suit, the Court may reject the same, and return it to the party, with the order of rejection endorsed thereon; and it shall not be competent to a party whose written statement has been rejected for any of these causes, to present another written statement, unless it shall be expressly called for or allowed by the Court.

A written statement may be called for by the Court without stating its reasons for so doing.

Of the Examination of the Parties.

SECTION 125.

Oral examination of party, &c., present in Court.

At the first hearing of the suit, and, if necessary, at any subsequent hearing, any party who appears in person or is present in Court, or the pleader of any party who appears by a pleader, or if the pleader be accompanied by another person able to answer all material questions relating to the suit, then such other person may be examined orally by the Court.

Oath.

Such examination shall (unless the pleader be the person examined) be upon oath or affirmation, or otherwise, according to the provisions of the law for the time being in force in relation to the examination of witnesses.

Substance of the examination to be written.

The substance of the examination shall be reduced to writing, and form part of the record.

This is one of the means by which the Court is to ascertain the real controversy between the parties, although the examination may be used as evidence in the case. The other mode of ascertaining the issues is laid down in Section 139.

"If the pleader be accompanied by another person." In many instances, the parties to a suit are not acquainted with the details of their cases: hence this provision. It refers to the person who accompanies a pleader under Section 41; it includes persons on behalf of either plaintiff or defendant. The examination of the pleader is not to be on oath. Great care should be taken, in reducing the substance of the examination to writing, that no material point be omitted. As long as the operation of this Code is not fully understood, it would be as well to have the examination recorded at length. The Courts should carefully avoid summoning the parties for examination, when the facts can be ascertained by the examination of their pleaders and agents.

"Who appears in person or is present in Court," that is, who appears under a summons, or is present in Court of his own accord. "Who appears in person" means personal appearance, and includes that by recognised agents.

"41. With regard to the examination of the parties at the first hearing of the suit, it is only necessary to point out that (except in cases which are to be finally disposed of at the first hearing) the examination should be limited to obtaining from each party a clear statement of the facts on which he relies, and ascertaining from him the exact points on which he and his adversary are at issue. If either of the parties have put in a written statement, it will only be necessary to question him regarding any allegations in that statement which appear obscure, or any facts alleged by his adversary which he has not fully noticed. Where the parties are represented by pleaders or agents who have not put in written statements, it will probably be most convenient to allow them to make concise statements of the facts of their clients' cases in the first place, questioning them afterwards on those points of difference between their adversaries and themselves, on which they do not appear to have been sufficiently explicit.

"42. Cross-examination by the pleaders on either side ought not to be permitted at this stage of the proceedings. The examination is to be wholly by the Court."—*S. C. Cir. Or., 29th July* 1859.

SECTION 126.

Consequence of refusal of a party to answer.

If any party who appears in person or is present in Court shall, without lawful excuse, refuse to answer any material question relating to the suit which the Court may think proper to put to such party, the Court may pass judgment against him, or make such other order in relation to the suit as it may deem proper in the circumstances of the case.

The Bombay Sudder Court remarked, 28th June 1860, in reply to a question whether a plaintiff or defendant, refusing to answer a question put to him, can be fined, that this Section allows the Court to give judgment against such party, or to lay all or any of the costs on him, which would virtually be a fine in many cases.*

* Act X. of 1855, to which the Court alluded, has been rescinded, with the exception of Sections 9 and 10, which do not bear on this subject.

It is by some considered very doubtful how far, if at all, such rules as those given in this and the following Sections can be acted upon. They argue that it is scarcely ever

SECTION 127.

Consequence of refusal or inability of pleader to answer.

If the pleader of any party who shall appear by a pleader shall refuse or be unable to answer any material question relating to the suit, which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day, and direct that such party shall attend in person on such day; and if the party so directed to attend shall, without lawful excuse, fail to appear in person on the day to be so appointed, the Court may pass judgment against him, or make such other order in relation to the suit as it may deem proper in the circumstances of the case.

The first of these Sections lays down what course the Court may adopt, if parties refuse to answer any material question relating to the suit. For instance, if a defendant appearing in person refuse to answer any material question, or do not appear personally under Section 127, the Court may give a decree to the plaintiff at once on account of such recusance or may proceed to try the case *ex-parte* on the plaintiff's evidence, at its discretion. In such case the Court need not proceed against the recusant party by other processes to enforce compliance. This Section also refers to the personal attendance of the defendant, as in Section 42, and subject to all its provisions.

"43. The power vested in the Courts by Section 127, of summoning the parties to answer particular questions, is only to be exercised where the question is material to one of the issues in the case, where the pleader has been unable or has refused to answer it, and where the Court has reason to believe that the party himself, if present, could answer it of his own knowledge. The Courts, therefore, in all cases where they summon parties under this Section, will be careful to record the question or questions, the pleader's inability to answer which has induced them to summon the parties, and the grounds of their expectation that the party summoned will be able to answer them."—*S. C. Cir. Or., 29th July* 1859.

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possible that the decision of any suit should depend on either party's answer to a single question, and as little that judgment against the party would be the proper punishment for the offence, the flagrancy of which must always be a matter of conjecture. Then, the question must be on a "material" point; and how will it be possible to determine that the party refusing to answer it has not a "lawful excuse" for so doing? Obviously, the rule is inapplicable to those cases where, on the evidence, the plaintiff's claim is liable to be dismissed, or the defendant has no good defence. Nor can it be intended that the Courts should possess an arbitrary power, to be used so as to deprive any party of his rights when the evidence requires that the judgment should be in his favour. The lower Court's judgments must always be according to "equity, justice, and good conscience," or they will not be upheld in appeal.

It is singular that punishment is provided for the pleader who may "refuse" to answer.

Of the Production of Documents.

SECTION 128.

Documentary evidence to be produced at first hearing.

The parties or their pleaders shall bring with them, and have in readiness at the first hearing of the suit, to be produced when called upon by the Court, all their documentary evidence of every description which may not already have been filed in Court, and all documents, writings, or other things which may have been specified in any notice which may have been served on them respectively within a reasonable time before the hearing of the suit; and no documentary evidence of any kind, which the parties or any of them may desire to produce, shall be received by the Court at any subsequent stage of the proceedings, unless good cause be shown to its satisfaction for the non-production thereof at the first hearing.

The provision of this Section will, it is to be presumed, impart regularity and punctuality to the prosecution of suits, by compelling parties to be ready with their evidence on the first hearing of a suit, and greatly tend to reduce the opportunities of fabricating evidence.

"Which may not already have been filed in Court," *i. e.* filed with the plaint under Section 29. Documents of the plaintiff in support of his own case cannot be received, unless filed with the plaint, without permission of the Court; but the Court can call for or allow any document to be filed, though not filed with the plaint.

"Reasonable." The Court should always take care to give so much time to the parties for the production of any document, writing, and other things as may prevent them from excusing their non-production on the score of time. This Section refers to the documentary evidence each party has to produce, and such documents as he is required to produce under Sections 40, 43, and 107. Such documentary evidence as is not produced at the first hearing cannot be received by the Court at any subsequent stage, unless good cause be shown for previous non-production.

SECTION 129.

Exhibits to be received and inspected by the Court.

Rejection of exhibits.

All exhibits produced by the parties shall be received and inspected by the Court; but it shall be competent to the Court, after inspection, to reject any exhibit which it may consider irrelevant or otherwise inadmissible, recording the grounds of such rejection.

This Section contains a wholesome provision for the rejection of irrelevant and inadmissible evidence.

Under the former practice of the Courts no restriction was imposed on the admission of documents, and the records were unnecessarily burdened with the so-called evidence, which, in many instances, had no connection with the real controversy between the parties. The Privy Council, in one of its judgments, had recently occasion to remark, as follows, on the irregular manner in which evidence was admitted in the first Court *(vide Moore's Indian Appeals*, Vol. VII. part I. pages 168, 169)—"It is unfortunately too much the habit of those Courts to receive documents, without that just discrimination which would prevail were the rules of evidence known and established; but their lordships are of opinion that they cannot, in these cases, take upon themselves to determine what ought, or ought not, to have been received in the courts in *India*. They may lament the great latitude with which documentary evidence is received, but it would be contrary to justice, in any particular case, to visit upon an individual penal consequences, because the administration of justice was not more strictly conducted with reference to the admission of evidence; and grievous, indeed, will be the task, and vain will be the attempt, of endeavouring to discriminate in these cases what was the precise course the Courts of primary jurisdiction ought to have pursued."

This irregularity will now be stopped, if the Courts act with discrimination.

When an exhibit is rejected, it must be returned under Section 134 to the party who produced it. The Court must at the same time record in a proceeding the reasons for such rejection, and keep the same with the record of the cause.

The Bombay Sudder Court's ruling of the 28th June 1860, is to the same effect.

"Otherwise inadmissible." For instance, a document is on plain paper when it ought to have been on a stamp. In such a case, there is nothing in the law to prevent the party from getting it stamped by the revenue authorities, and then presenting it for acceptance, it being competent to the Court to receive evidence at any stage of the case, on cause shown.

SECTIONS 130, 131.

[Repealed and re-enacted, with modifications, by Clauses 4 and 5, Section 13, Act XXXVI. of 1860, which again have been superseded by Section 17, Act X. of 1862, here inserted, with Sections 15 and 16, referred to therein.]

XV. Clause 1.—If any deed, instrument, or writing, requiring to be stamped under Section 2 of this Act, shall have been executed on paper not bearing the proper stamp, the Collector of stamp revenue of the district, if satisfied that the omission or neglect to execute such deed, instrument, or writing, on paper bearing the proper stamp, did not arise from any intention to evade payment of the stamp duty prescribed by this Act for such deed, instrument, or writing, or otherwise to defraud the Government, may, on payment of the proper stamp duty, or if the deed, instrument, or writing shall be insufficiently stamped, on payment of such sum as, with the amount of the stamp upon such deed, instrument, or writing, shall suffice to complete the prescribed amount, and, as a penalty, double the amount required to make up the same, direct that such deed, instrument, or writing be duly stamped. Provided that such deed, instrument, or writing be presented to such Collector, for the purpose of having the proper stamp affixed to or impressed upon it, within six weeks from the date of its execution. If the Collector be satisfied that the omission or neglect to execute such deed, instrument, or writing, on paper bearing the proper stamp, arose solely from urgent necessity or unavoidable accident, he may remit the penalty prescribed by this Section.

Deeds inadvertently executed on paper not bearing proper stamp may be duly stamped on payment of proper stamp duty and penalty, if brought to the Collector within six weeks.

Remission of penalty.

Clause 2.—If any deed, instrument, or writing, requiring to be stamped under Section 2 of this Act, which shall have been executed on unstampt or insufficiently stampt paper, shall be brought to such Collector, for the purpose of being properly stamped, after six weeks from the date of its execution, but within four months from that date, such Collector, if satisfied that the omission or neglect to execute such deed, instrument, or writing, on paper bearing the proper stamp, did not arise from any intention to evade the payment of the stamp duty prescribed by this Act for such deed, instrument, or writing, or otherwise to defraud the Government, may, on payment of a sum sufficient to make up the proper amount of stamp duty, and, as a penalty, treble the amount required to make up the same, direct that the requisite stamp be impressed on such deed, instrument, or writing; or if such deed, instrument, or writing shall not be brought to such Collector, until after the expiration of four months from the date of its execution, the requisite stamp may be ordered to be impressed on payment of the sum required to make up the proper amount of stamp duty, and, as a penalty, twenty times the amount required to make up the same.

Penalty if executed on unstampt or insufficiently stampt paper and brought to be stamped after six weeks of execution but within four months of that date.

Penalty if brought after four months.

[*Clauses* 3 *to* 5 are applicable exclusively to the Revenue Authorities.]

Clause 6.—The Board of Revenue, or other chief controlling Revenue Authority, may, upon petition, order any penalty, imposed under this Section, to be mitigated, and, if paid, may order the whole or any part of it to be returned.

XVI. The stamp, which shall be impressed under the last preceding Section, shall be taken in any Court of Justice to be the proper stamp required by this Act for the deed, instrument, or writing on which the same is impressed.

The stamp impressed under the preceding Section to be taken to be the proper stamp.

*XVII.** *Clause* 1.—In any case in which a stamp might be impressed under Section 15 of this Act, a Civil Court may receive in evidence any deed, instrument, or writing, not bearing the stamp prescribed by Schedule *A* annexed to this Act, on payment into Court of the proper amount of stamp duty, to be determined by the Court, whose decision on the point shall be final, together with the penalty required by the said Section.

In cases falling under Section 15, Civil Courts may receive in evidence unstampt or insufficiently stampt deeds, on payment of the proper stamp duty and penalty.

Clause 2.—An entry of such payment setting forth the amount thereof shall be made in a book to be kept by the Court, and shall also be endorsed on the back of the deed, instrument, or writing, and shall be signed by the Court. The Court shall, at the end of every month, make a return to the Collector of the stamp revenue of the district, of the money (if any) which it has so received, distinguishing between the sums received by way of penalty and the sums received by way of duty, stating the number and title of the suit, and the name of the party from whom such money was received, and the date, if any, and description of the document, for the purpose of identifying the same; and the Court shall pay over the money so received to such Collector or to such person as he may appoint to receive the same. Such Collector or other proper authority shall, upon the production of the deed, instrument, or writing, with the endorsement hereinbefore mentioned, cause it to be stamped thereon with a stamp of the amount paid into Court on account of such duty. The provisions contained in Clause 6, Section 15 of this Act, as to the mitigation or payment of penalties paid to the Collector, shall be applicable to penalties paid into Court under this Section.

Procedure on payment under preceding Clause.

XVIII. No deed, instrument, or writing executed on unstampt or insufficiently stampt paper, shall be stamped at any time after the execution thereof, except as hereinbefore provided.

No unstampt or insufficiently stampt deed, &c. to be stamped, except as aforesaid.

The Circular Order of the Calcutta and Agra Sudder Courts, of the 7th January 1842, laid down the course to be followed, when exhibits on insufficient stamps were filed in a suit. That procedure was set aside by the ruling of the Calcutta Sudder Court in the case of Rajendro Chatterjee, *v.* Taramonee Dabea, decided on the 17th September 1850. It was then held, that the practice of returning documents to parties for the purpose of being properly stamped was illegal, and that the cases in which they are filed should be decided irrespective of them. That change in the procedure entailed great loss and hardship on suitors. This Section obviates such results by empowering the Courts to receive such documents in evidence, from

* The appearance of Section 17 in the text is called for, as it, in substance, constituted Sections 130 and 131 of this Code. The insertion of Clauses 1, 2, and 6 of Section 15 and the following Section of the Stamp Law is necessary to render the duty enjoined on the Court intelligible. Several other Sections of that law particularly concern the ordinary Civil Courts, *viz.*, 1, 2, 14, 18, 19, 26, 28, 30, and 32.

the party producing them, on payment into Court of the deficiency of the stamp duty and a penalty of ten times the deficiency.

The original Section 130 authorised the Court to "receive in evidence" a deed improperly stamped, "if the party producing it or requiring its production shall pay into Court the deficiency of the stamp duty and a penalty equal to ten times the amount of the deficiency," and provided there was no reason to presume an "intention of evading the stamp law." The reference in this amended Section to Section 15 of the Stamp Law implies that the Court shall determine the amount of penalty leviable, by a reference to the conditions set forth therein for regulating the Collector's decision.

The Madras Sudder Court held, 17th January 1860, that the execution of a deed prior to the 1st January 1860, does not affect the question of its liability to rejection, if offered in evidence after that date.

The Calcutta Sudder Court, on the 14th September 1859, and the Madras Sudder Court, on the 25th February 1860, ruled that (the original) Section 130 was not applicable to exhibits written on unstampt materials.

The rules in Section 15, Act X. of 1862, indicate that deeds on plain paper, as well as those on insufficiently stampt paper, may be received by the Courts, on payment of the proper penalty, provided there have been no "intention of evading the stamp law."

"Upon the production of the deed, instrument, or writing." This may be done at any time and without the interference or intervention of the Court, whose duty is confined to making the endorsement mentioned.

"Receive the same in evidence." Held by the Bombay Sudder Court, 28th June 1860, that the case should not be postponed for the stamping of the documents, which can be subsequently done.

SECTION 132.

Admitted exhibits to be marked and filed.

When an exhibit is received by the Court and admitted in evidence, it shall be endorsed with the number and title of the suit, the name of the party producing it, and the date on which it was produced, and shall be filed as part of the record. Provided that, if the exhibit be an entry in any shop-book or other book, the party on whose behalf such book is produced shall furnish a copy of the entry, which copy shall be endorsed as aforesaid, and shall be filed as part of the record, and the book shall be returned to the party producing it.

Proviso.

The rule, as to the mode in which exhibits are to be received by the Court and admitted in evidence, is here laid down. The original exhibit filed with the plaint may be returned to the plaintiff, as provided in Section 39; but documents filed as evidence by either party at the time of hearing are not to be returned, except shop-books and books of accounts. The plaintiff must produce the original documents returned to him under Section 39 at the time of hearing.

Held by the Bombay Sudder Court, 28th June 1860, that to the endorsement on the document on which a claim is founded, as well as on other exhibits, the initials of the Judge should be attached, but that the plaint need not be endorsed with the names of the plaintiff and defendant.

SECTION 133.

No stamp duty in respect of the production or filing of exhibits.

No stamp duty shall be leviable in respect of the production or filing of any exhibit, any thing contained in any Regulation or Act notwithstanding.

The stamp duty levied on the production or filing of exhibits under the former law, operated in some instances as a hardship on suitors. Some judges required a stamp fee for every exhibit, such as dakhilas and jumma-wasil-bakees, (of which a number is generally put in,) thus rendering it difficult for the parties to file their proofs. The stamp duty on exhibits is done away with by this Section.

The Agra and Madras Sudder Courts have ruled that no petition on stampt paper is required for the filing of exhibits.

SECTION 134.

Rejected exhibits to be marked and returned.

Unless detained by the Court.

When an exhibit is rejected by the Court, it shall be endorsed in the manner specified in Section 132, with the addition of the word "rejected," and the endorsement shall be subscribed by the Judge. The exhibit shall then be returned to the party who produced it, unless the Court shall think proper, for special reasons (as on suspicion of forgery) to detain it.

This Section should be read in connection with Sections 129 and 132.

SECTION 135.

After the time for appeal has elapsed, exhibit admitted in evidence may be returned.

When the time for preferring an appeal from the decision passed in the suit has elapsed, or if an appeal has been preferred from such decision, then, after the appeal has been finally disposed of, any person, whether a party to the suit or not, who may be desirous of receiving back any exhibit produced by him in the suit, shall

be entitled, on application to the Court in which such exhibit may be, to receive back the same, unless the further use of such exhibit has been superseded by the terms of the decree, or the Court has directed it to be detained for purposes of public justice.

This Section lays down rules for returning documents to the persons filing them, after the final disposal of the suit. The procedure is similar to what existed before.

Held by the Bombay Sudder Court, 30th April 1860: "Copies of exhibits returned under the provisions of this Section, must be substituted for the originals in the record of the suit, and the expense must be defrayed by the applicant, (Section 136)."

"Unless the further use of such exhibit has been superseded by the terms of the decision." For instance, when a plaintiff obtains a decree on a bond, the decree must be taken as a substitute for the bond, and the latter will not be returned to the plaintiff after final judgment.

"For purposes of public justice," as on suspicion of forgery, or on application of a party who is about to commence a criminal prosecution on the document, the return of which is applied for.

When a document is returned under this Section, no copy is to be retained. But the Bombay Sudder Court, on the 30th April 1860, adverting probably to the following Section, ruled that a copy must be retained at the expense of the applicant.

SECTION 136.

Any exhibit may be returned before the time mentioned in the last preceding Section, if the Court, in which the document may be, shall think proper, for special reasons, to order its return. But in every case a copy properly certified, and made at the expense of the applicant, shall be substituted for the original in the record of the suit.

Exhibit may be returned before the time limited, for special reason.

Certified copy to be kept.

"For special reasons," as when a party wishes the return of a document filed in one case, for the purpose of filing it in another case, in a different Court, where the production of the original is required. When a document is returned under Section 135, copies thereof need not be retained. It is not so under this Section. The copy substituted with the record of the suit may be on plain paper.

The Madras Sudder Court ruled, 17th January 1860, that the provisions of this Section, as respects copies of exhibits, are not applicable to the Courts of District Moonsiffs, the records of which are deposited in the Appellate Court.

SECTION 137.

Receipt to be given for returned exhibit.

Whenever an exhibit, once received by a Court of Justice and admitted in evidence, is returned, a receipt shall be given by the party receiving it in a receipt-book kept for the purpose.

The practice of taking a receipt on the return of a document already exists.

Held by the Madras Sudder Court, 5th February 1861: "A district Moonsiff is competent under this Section to return an original document to the party by whom it was produced, upon his providing the expense of making an authenticated copy of the same, for deposit with the record of the suit."

SECTION 138.

Court may send for papers from its own records, or from other public offices or Courts.

Except State papers.

Any Civil Court may, of its own accord, or upon the application of any of the parties to a suit, send for, either from its own record or from any other public office or Court, the record of any other suit or case, or any other official papers, (not being documents relating to affairs of State, the production of which may be contrary to good policy,) and inspect the same, when the inspection of such record or papers shall appear likely to elucidate the facts of the suit before the Court and to promote the ends of justice.

Under the law of 1793, the Civil Courts were not authorised to send for any documents or papers from other Courts and public offices, and were bound to decide the cases on the evidence tendered by the parties. At times, however, they did not strictly act up to that rule, but called for explanations and papers for the better elucidation of doubtful points.

"Public offices" means offices of the executive authorities, for instance, the office of the Collector. "The production of which may be contrary to good policy," for instance, papers which relate to affairs of the State, in regard to its relation with foreign powers, the secrecy of which ought to be maintained.

See the concluding part of remarks on Section 149.

The Bombay Sudder Court intimated, 28th April 1860, that special provision having been made, by their Circular, for the supply of copies of their decrees, the originals should not be called for unless expected to afford some elucidation not obtainable from the copies. They also remarked, 21st June 1860, that, as heretofore, applications for their original decrees should be made by Moonsiffs through the District Judges.

Of the Settlement of Issues.

SECTION 139.

Framing of issues.

At the first hearing of the suit the Court shall inquire and ascertain upon what questions of law or fact the parties are at issue,* and shall thereupon proceed to frame and record the issues of law and fact on which the right decision of the case may depend. The Court may frame the issues* from the allegations of fact which it collects from the oral examination of the parties or their pleaders, notwithstanding any difference between such allegations of fact and the allegations of fact contained in the written statements, if any, tendered by the parties or their pleaders.

This Section very much resembles the provisions of Section 10, Regulation XXVI. of 1814 of the Bengal Code. At the first hearing of the case, the Civil Court is to ascertain, from the parties or their pleaders, the points at issue between them, and then frame the issues. They may be gathered from the oral examination of the parties and their pleaders, or the persons who accompany the latter, and the written statements. When the two differ, the allegation of facts made in the oral examination is to be preferred.

"44. When the issues are framed, the Court may either dispose of the case at once after hearing argument and evidence, or may fix a day for the production of evidence and for argument on the issues. In the latter case the issues and the notice to attend will be recorded in the following form.

"Regular Suit No. 18. Ramchunder, plaintiff, *versus* Shamchunder, defendant. In this case the issues are—

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* "At issue." Blackstone observes, following Sir Matthew Hale, that "when, in the course of pleading, the parties come to a point, which is *affirmed* on one side, and *denied* on the other, they are then said to be *at issue*." This, Serjeant Stephens thus explains: "*ad exitum*, at the *end* of their pleading." The "question for decision was itself called *the issue*, and was designated, according to its nature, either as an issue in *fact* or an issue in *law*." The *general issue* was "a denial of the whole matter alleged, or at least of the principal fact upon which it is founded." Other *pleas in bar* of the action are termed *special pleas*, such as "those which show that the cause of action, though once existing, has been *barred* by matter subsequent; as by payment, or release, or accord and satisfaction, or by the statute of limitations, or a set-off."

It is observable that though, by Section 41, the defendant is "to appear and *answer* the claim," no *defence* or answer, in other words, neither plea nor pleading, is allowed, but merely a written statement of one's own case, and an examination of the parties or their pleaders. There is consequently not much propriety in the use of the term *issue*. But it will be seen, from the form even of "Defendant's Statement" in the Appendix, that defendants cannot *avoid* answering the plaintiffs' declarations.

The expression "issue in bar of suit" used by the Calcutta Sudder Court is inappropriate. The allusion is to such "pleas in bar" as limitation, proof of which would obviate the necessity of further inquiries into the plaintiff's statements.

In bar of suit arising on the plaint [or plaintiff's statement]. 1st—and so forth,

Of Fact. 1st—and so forth.

Of Law arising out of fact found. 1st—and so forth.

"The above issues were settled by the Court at the hearing of this case, on the ——— of ———, when the following persons were orally examined, ———.

"The case stands adjourned for the final hearing under Section 172, till the ——— of ———, when both parties are required to have their witnesses in attendance at this Court, at 11 A. M."—*S. C. Cir. Or., 29th July* 1859.

SECTION 140.

Court may examine witnesses or documents before framing the issues.

If the Court shall be of opinion that the issues cannot be correctly framed without the examination of some person other than the persons already before the Court, or without the reading of some document not produced by any of such persons, it may adjourn the framing of the issues to a future day, to be fixed by the Court, and may compel the attendance of such person, or the production of the document by the person in whose hands it may be, by summons or other suitable process.

"By summons or other suitable process." Where the attendance of any person is required, it should be enforced by summons under Section 47 and following Sections. When any documents are required to be produced, the requisition should be made by notice under Section 107.

"Examination of some person other than the persons already before the Court" includes parties to the suit.

SECTION 141.

Amendments of issues.

Additional issues.

At any time before the decision of the case, the Court may amend the issues or frame additional issues on such terms as to it shall seem fit; and all such amendments as may be necessary for the purpose of determining the real question or controversy between the parties shall be so made.

The Court may amend issues or frame additional issues before judgment. "On such terms as to the Court shall seem fit," as for instance, the imposition of costs on either party by interlocutory order. When additional issues are rendered necessary, on account of the *laches* or default of the plaintiff, such costs as the defendant incurs by such default are to be charged to the plaintiff.

Of Issues by Agreement of parties.

Section 142.

Questions of fact or law may, by agreement, be stated by the parties in the form of an issue.

When the parties to a suit are agreed as to the question or questions of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing, which shall not be subject to any stamp duty, that, upon the finding of the Court in the affirmative or the negative of such issue, a sum of money specified in the agreement, or to be ascertained by the Court upon a question inserted in the issue for that purpose, shall be paid by one of the parties to the other of them, or that, upon such finding, some property specified in the agreement, and in dispute in the suit, shall be delivered by one of the parties to the other of them, or that, upon such finding, one or more of the parties shall do or perform some particular legal act, or shall refrain from doing or performing some particular act specified in the agreement, and having reference to the matter in dispute.

The provision of this Section is intended to facilitate the decision of a suit, and for the early determination of the dispute between the parties, when they agree among themselves about the settlement of the issues. The agreement binds the parties to abide by the decision given by the Court on the issues, without further appeal, as they would be bound by the award of arbitrators. Accordingly, the Agra Sudder Court, in the case of Syed Hyder Ali and another *v.* Khoorshid Begum, decided 8th May 1861, "held the decision of a Court, upon an issue selected and agreed upon by the parties, not to be subject to appeal."* Provision for the determination of disputes between persons not in suit before a Court is made by Section 328. These proceedings are very much of the nature of special cases, often submitted for decision to the Supreme Court.

Section 143.

Court, if satisfied that the agreement was executed *bonâ fide*, may give judgment.

If the Court shall be satisfied, after an examination of the parties or their pleaders, and taking such evidence as it may deem proper, that the agreement was duly executed by the parties, and that the parties have a *bonâ fide* interest in the decision of such question, and that the same is fit to be tried and decided, it may proceed to record and

* The award of arbitrators is binding when it is not liable to the objections indicated in Sections 323 and 324, and is approved of by the Court under Section 325. But it is considered by some to be doubtful if the Legislature intended that the judgments of any Court should be not liable to appeal, ("except when otherwise *expressly* provided," Section 332,) merely because it was relieved from the labour of *trying* the case, by hearing and weighing the evidence. The concluding words of Section 143 *imply* that like other judgments these are subject to appeal. See the notes on the Chapter on Arbitration.

try the same, and deliver its finding or opinion thereon in the same manner as if the issue had been framed by the Court, and may, upon the finding or decision on such issue, give judgment for the sum so agreed on or so ascertained as aforesaid, or otherwise according to the terms of the agreement; and upon the judgment which shall be so given, decree shall follow, and may be executed in the same way as if the judgment had been pronounced in a contested suit.

Before granting the prayer of the parties under this Section, by undertaking to decide the issues put before it, the Court will satisfy itself by the examination of the parties, and other evidence if necessary, that the agreement was really executed by the parties, that they have a *bonâ fide* interest in the decision of the issue, and that the trial applied for is not intended for purposes of fraud and injury to other parties. A decree passed under these Sections is not appealable in the usual way.

When the Suit may be disposed of at the first Hearing.

SECTION 144.

If the parties are not at issue on any question of law or fact.

If at the first hearing of a suit it shall appear that the parties are not at issue* on any question of law or fact, the Court may at once give judgment.

The contingency contemplated by this Section can hardly arise. Cases in which judgments are obtained on the admissions of the defendants may be included in the Section.

SECTION 145.

If the parties are at issue on questions of law or fact.

Court, if satisfied, may determine the issues and give judgment.

Proviso where summons is for final disposal.

When the parties are at issue on some question of law or fact, and issues have been framed by the Court as hereinbefore provided, if the Court shall be satisfied that no further argument or evidence than such as the parties or their pleaders can at once supply is required upon any such of the issues of law or fact as may be sufficient for the decision of the suit, the Court, after hearing such argument and evidence, may proceed to determine such issue or issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons shall have been issued for the settlement of issues only or for the final disposal of the suit; otherwise the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case may require. Provided that, if the summons shall have been issued for the final disposal of the suit, and either party shall fail, without sufficient cause, to produce the evidence on which he relies, the Court may at once give judgment.

* "Not *at issue*," *i. e.*, what is *affirmed* by the plaintiff is not *denied* by the defendant.

For instance, in an action on bond, the issues fixed by the Court are—1*st*, whether limitation bars the plaintiff's remedy; 2*nd*, whether the bond is proved or not; 3*rd*, if proved, what amount of principal and interest is due to plaintiff. If the Court, on the first hearing, be satisfied on the evidence produced by the parties, that sufficient evidence has been produced on the first issue, it may proceed at once to determine it, and if the determination be in favor of defendant, it may pass judgment in the case, dismissing the plaintiff's suit. If the suit become ripe for decision as shown above, no exception will be allowed to be taken to the judgment on the ground that the summons to the defendant was merely for the settlement of issues. If, again, the summons be for the final disposal of the case, and either party fail to produce all the necessary evidence, the Court may proceed to pass judgment at once on the evidence as filed, without adjournment, as prescribed in this Section.

Of Adjournments.

SECTION 146.

The Court may, if sufficient cause be shown, at any stage of the suit, grant time to the parties or to either of them, and may from time to time adjourn the hearing of the suit; and in all such cases the Court shall fix a day for the further hearing oft he suit. Provided that, in all such cases, the party applying for time shall pay the costs occasioned by such adjournment, unless the Court shall otherwise direct.

Court may grant time, or adjourn to a future day.

Proviso.

It will be difficult to fix, by interlocutory orders, the rate of costs to be awarded as contemplated by this Section, and on similar contingencies. In the Civil Courts the present practice is to pay the fees of pleaders at once for the conduct of the case throughout. In the Supreme Court, counsel were paid separately for particular acts done during the progress of a suit, and therefore such costs were easily ascertained.

"Costs occasioned by such adjournment," *i. e.* such costs as the opposite party may have incurred in bringing his witnesses, or in his own personal appearance, for any particular hearing.

Held by the Bombay Sudder Court, 28th June 1860, that applications for postponement should be on stampt paper.

SECTION 147.

How Court is to proceed if the parties fail to appear on the day fixed.

If, on any day to which the hearing of the suit may be adjourned, the parties or either of them shall not appear in person or by pleader, the Court may proceed to dispose of the suit in the manner specified in Section 110, Section 111, or Section 114, as the case may be, or may make such other order as may appear to be just and proper in the circumstances of the case.

It will of course be discretionary with the Court to visit parties with the penalties prescribed in Sections 110, 111, and 114, or to follow a lenient course, as the circumstances of each case may indicate.

SECTION 148.

Court to proceed to a decision, notwithstanding either party fail to produce proofs or witnesses.

If either party to a suit to whom time may have been granted shall fail to produce his proofs, or to cause the attendance of his witnesses, or to perform any other act for which time may have been allowed, the Court shall proceed to a decision of the suit on the record, notwithstanding such default.

This Section applies only to those cases where time has been allowed to a party to perform any act. In default, the Court is to decide on such evidence as is on the record.

Of Summoning Witnesses.

SECTION 149.

Application for summons.

The parties or their pleaders may, at any time after the issue of the summons to the defendant, if the summons be for the final disposal of the suit, or after the issues have been recorded, if the summons to the defendant be for the settlement of issues only, obtain, on application to the Court, summonses to witnesses or other persons to attend, either to give evidence or to produce documents, and in any such summons the names of any number of persons may be inserted.

The rules preceding this have reference to the parties to a suit, as to the manner in which the one party is to be summoned or examined by the Court, at its own instance, or at the instance of the other party. The rules contained in this and the following Sections, that is, from 149 to 179, refer to witnesses or other persons whether parties to the suit or not. A party to a suit may be cited as a witness by the other party, notwithstanding he may have been examined by the Court under Section 125. The term party, mentioned in this Section, as in all other Sections where it is used without qualification, includes a recognised agent prescribed by Section 17. Summonses for the attendance of witnesses should, for evident reasons, be applied for imme-

diately after the summons to the defendant, when the latter is summoned for the final disposal of the suit. Where the summons is only for the settlement of issues, the summons may be applied for after settlement of issues, as under the former practice.

Held by the Madras Sudder Court, 19th March 1860: "Subordinates in public offices cannot be summoned to produce official papers. Application should be made to the head of the department to which such papers appertain, requesting him to send them for the Court's inspection. Applications for revenue papers must in all cases be made to the Collector of the district."

SECTION 150.

No stamp duty on application for summons.

No stamp duty shall be leviable in respect of any application for the summons of a witness or other person to attend either to give evidence or to produce a document, anything contained in any Regulation or Act notwithstanding.

A corresponding provision with Section 133.

SECTION 151.

Expenses of witnesses to be paid before issue of summons.

Scale of expenses.

Tender of expenses to witness.

The person applying for a summons shall pay into Court such a sum of money as shall appear to the Court to be reasonable, to defray the travelling and other expenses of each witness or other person mentioned in the summons, in passing to and from the Court in which he may be required to attend, and for one day's attendance. If the Court be a subordinate Court, regard shall be had, in fixing the scale of such expenses, to the rules (if any) established by the Court to which such Court shall be immediately subordinate. The sum so paid into Court shall be tendered to the witness or other person at the time of serving the summons, if it can be served personally.

If sum be not sufficient.

If it shall appear to the Court that the sum paid into Court, on account of the travelling and other expenses of the witness or other person in passing to and from the Court is not sufficient to cover such expenses, the Court may direct such further sum to be paid to the witness or other person as may appear to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the goods of the person ordered to pay the same, or may discharge the witness without requiring him to give evidence.

Expenses if witness be detained.

If it shall be necessary to detain the witness or other person summoned for a longer period than one day, the Court may, from time to time, order the party, at whose instance he was summoned, to pay into Court such sum as may be sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order the witness to be discharged without requiring him to give evidence.

In all cases, it is to be presumed that every witness will appear on the day fixed for his attendance and be examined immediately on his arrival. If the business of the Court, or other good cause, do not admit of his being so examined, the expenses to be incurred for his detention will be paid by the party citing him, as provided in the last part of this Section.

"Fixing the scale of such expenses." Held by the Bombay Sudder Court, 27th June 1860, that, subject to their sanction, the scale is to be fixed by the several District Judges.

To secure uniformity, it is desirable that the scale of expenses to be tendered to witnesses should be fixed by the authority of the several Sudder Courts.

The provisions of this Section are nearly similar to those of Section 12, Act XIX. of 1853. One material difference is, that while, under the latter law, the witness, on default of payment of his expenses, could refuse to give evidence or produce documents, under this Code the discretion to discharge him is given to the Court. The levy of a further sum is not intended to apply to the costs of the first issue of summons, as no summons will issue in the first instance unless the estimated costs have been paid into Court. The levy by attachment and sale applies to the case of the detention of a witness at the discretion of the Court.

Held by the Madras Sudder Court, 1st October 1860. "In pauper suits, as in other suits, the plaintiff must pay into Court the expenses of his witnesses before the summons can be issued."

"Travelling and other expenses." Held by the Bombay Sudder Court, 28th June 1860, that these need not be tendered when the summons is served on a male member of the family of the witness, under Section 155.

SECTION 152.

Time, place, and purpose of attendance to be specified in summons.

Every summons for the attendance of a witness or other person shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document which the witness or other person may be called on to produce shall be described in the summons with convenient certainty.

"Convenient certainty," *i. e.* the document required to be produced is to be so described that there may be no reasonable doubt in regard to its identity. *Vide* Section 13, Act XIX. of 1853.

SECTION 153.

Summons to produce a document—production by an agent.

Any person, whether a party to a suit or not, may be summoned to produce a document, without being summoned to give evidence; and any person, summoned merely to produce a document, shall be deemed to have complied with the summons if he cause such document to be produced, instead of attending personally to produce the same.

Vide Section 16, Act XIX. of 1853.

Service of Summons on a Witness.

SECTION 154.

How and when the summons shall be served.

Every summons to a witness or other person shall be served by exhibiting the original, and delivering or tendering a copy; and the service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the witness or other person, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

Vide Section 14, Act XIX. of 1853. It is also consonant to the process of the service of summons on defendant under Section 48.

"Tendering a copy." Held by the Madras Sudder Court, 1st October 1860: "The serving officer is to be provided with a separate copy of the summons for each of the witnesses."

Held by the Bombay Sudder Court, 28th June 1860, "that it must be a correct copy and that they saw no reason why it should not be authenticated."

"Exhibiting the original" obviates the necessity and expense of authenticating the "office copies" served, but for which every summons would require the seal of the Court and signature of the Judge.

SECTION 155.

Service to be on the witness, or a male member of his family.

Whenever it may be practicable, the service of the summons shall be upon the person thereby required to attend; but when he cannot be found, the service may be made on any adult male member of his family residing with him.

When the witness has an agent appointed under Section 50 to receive summonses and other processes of Court, the summons may be served on such agent, unless otherwise specially directed. In case of parties being cited as witnesses, the procedure is the same. If the party have appeared

by pleader or recognised agent, service on either will be sufficient. The provision of the Section is similar to that of Section 53. The same precautions should be taken as suggested in the remarks on that Section.

"45. The Courts will take notice of the provisions of the Code (Sections 155 and 159,) which allow service of a summons to a witness to be made on any adult male member of his family residing with him. It is not meant by this provision that service on a personal enemy of the witness would be sufficient service on the witness, merely because they occupied the same homestead. To render the service a good service, the parties must be *bonâ fide* living together in commensality, or at least in the same house. Care will be necessary to prevent this Section being taken advantage of for purposes of fraud."—*S. C. Cir. Or., 29th July* 1859.

SECTION 156.

When the person required to attend cannot be found, and there is no adult male member of his family on whom the summons can be served, the serving officer shall return the summons to the Court from whence it issued, with endorsement thereon that he has been unable to serve it.

When the summons cannot be served, it is to be returned to the Court.

Unlike the service of summonses on defendants, personal service of summons on a witness, and the alternative of service on an adult male member of his family, are the only means prescribed for procuring the attendance of a witness. If these fail, and his attendance be material, recourse may be had to the provisions of Section 159.

SECTION 157.

The serving officer shall, in all cases in which the summons has been served, endorse on the original summons the time when, and the manner in which, it was served.

Time and manner of service to be endorsed on the summons.

SECTION 158.

If the person required to attend be resident within the jurisdiction of any other Court than that in which the suit is pending, the summons shall be transmitted, by the Court in which the suit is pending, to any Court having jurisdiction at the place where the witness resides, by which it can be most conveniently served; and the Court to which the summons is sent shall, upon receipt thereof, deliver the same to the nazir or other proper officer of such Court, to be served in the manner above directed; and upon the return of the summons by the serving officer, it shall be transmitted to the Court from whence it originally issued.

How a summons on a witness who resides in another jurisdiction is to be served.

This Section lays down the rule for the service of summons upon a witness residing beyond the limits of the Court issuing the summons. In such cases the summons is to be sent to the Court within whose jurisdiction the witness resides; and that Court will cause it to be served like its own processes, as prescribed in Sections 155, 156, and 157.

With reference to the difficulty of estimating beforehand the expense of summoning persons in other zillahs, the Bombay Sudder Court remarked, 28th June 1860, that, in such cases, "the estimated or probable amount should previously be paid into Court, and any difference accounted for afterwards."

SECTION 159.

When a witness absconds, his property may be attached.

If the summons for the attendance of any person, either to give evidence or to produce a document, cannot be served in either of the ways hereinbefore specified, the Court, on being certified thereof by the return of the serving officer, and upon proof that the evidence of such witness or the production of the document is material, and that the witness or other person absconds or keeps out of the way for the purpose of avoiding the service of the summons, may cause a proclamation requiring the attendance of such person to give evidence or produce the document, at a time and place to be named therein, to be affixed in some conspicuous place upon his house or place of abode; and if such person shall not attend at the time and place named in such proclamation, the Court may, at the instance of the party on whose application the summons was issued, make an order for the attachment of the movable and immovable property of such person, to such amount as the Court shall deem reasonable, not being in excess of the amount of the costs of attachment and of any fine to which the person may be liable under the provisions of the following Section.

The Bombay Sudder Court remarked, 28th June 1860, that, "if property is to be attached under this Section, the rules for attachment generally should govern the procedure."

SECTION 160.

How the Court is to proceed with the witness on his appearance.

If, on the attachment of the property, such witness or other person shall appear and satisfy the Court, that he did not abscond or keep out of the way to avoid service of the summons, and that he had not notice of the proclamation in time to attend at the time and place named therein, the Court shall direct that the property be released from attachment, and shall make such order in regard to the costs of the attachment as it shall deem fit. If such witness or other person shall not appear, or appearing shall fail to satisfy the Court that he did not abscond or keep out of the way to avoid service of the summons, and that he had not such a notice of the proclamation as aforesaid, it shall be lawful for the Court to order the property attached, or any part thereof, to be sold for the purpose of satisfying all costs

incurred in consequence of such attachment, together with the amount of any fine which the Court may impose upon such witness or other person, under the provisions of any law, for the time being in force, for the punishment of a witness who may abscond or keep out of the way in order to avoid the service of a summons. If the witness or other person shall pay into Court the costs and fine as aforesaid, the Court shall order the property to be released from attachment.

These Sections generally correspond with Sections 27 and 28 of Act XIX. of 1853. To prevent fraud and collusion, the publication of the proclamation should be certified by the affidavit of the serving officer, which may be required, in case of suspicion, to be supported by the evidence of one or more persons, in whose presence the proclamation was affixed. The Court will do well to satisfy itself of the due publication of the proclamation, before ordering attachment on default. By comparing these two Sections with the corresponding provisions in Act XIX. of 1853, it will be seen that an obvious improvement in the procedure has been introduced. By this Code, if the witness do not appear within the term of the proclamation, a fine is imposed upon him, and attachment ordered of such portion of his property as may be deemed adequate to the amount of the fine and the probable costs of attachment and ultimate sale. If he appear after attachment, and satisfy the Court that he was not in fault, as provided in Section 160, his property should be released, the Court merely making an order as to whether the costs of attachment, or any portion of them, are to be paid by the witness. If the witness do not appear after attachment, or appearing fail to justify his absence, the Court may order the whole or a portion of the attached property to be sold for the costs of attachment and ultimate sale, and the amount of the fine which the Court had imposed for such default. Under the previous law (Section 27, Act XIX. of 1853) it was left to the Courts to fix the amount of the fine, as they might consider reasonable, having regard to all the circumstances of the default and of the person fined, but in no case exceeding the amount in dispute. The measure of the fine under this Code is not limited to such amount. The Penal Code (Section 172) fixes the maximum amount at 1000 Rs., which may be with or without simple imprisonment for a term extending to six months.

Whether the witness appear or not, if he pay into Court the costs and fine so ordered to be paid and levied, his

property must be released from attachment. It was a doubtful question whether a witness, on whom a fine was imposed under Act XIX. of 1853, could be allowed to pay the amount and obtain a release of his property from attachment and exemption from appearing in Court. As this Code provides for the release of the property from attachment, whether the witness appear or not, it would follow, on general principles of law, that no further proceedings can be taken to compel his attendance in the same suit. The party endamaged will be at liberty to proceed against the defaulting witness by a civil suit for damages, under the provisions of Section 26, Act XIX. of 1853, which has not been repealed.

"Upon proof," (Section 159,) *i. e.* proof is to be called for at the discretion of the Court. The Court may be satisfied, on the affidavit of the party citing the witness, or may require other evidence, of the necessity of the attendance of the witness and of his keeping out of the way to avoid being served.

"46. Under Section 159, it will be observed that, in future, witnesses who keep out of the way, so that they cannot be served, are not to be proceeded against without proof that their evidence is material; and their property is not to be attached, except at the instance of the party summoning them."—*S. C. Cir. Or., 29th July* 1859.

The Bombay Sudder Court, in reply to a reference, remarked, 28th June 1860, that the rules applicable to sales in general should, unless plainly inapplicable, be applied to sales of an absconding witness's property under this Section.

Of the Examination of Parties as Witnesses.

SECTION 161.

When a party to a suit appears in person at any hearing of the suit, he may be examined as a witness either in his own behalf or on behalf of any other party to the suit, in the same way as if he were not a party thereto.

A party to a suit appearing in person may be examined either in his own behalf or on behalf of any other party.

Vide Section 2, Act XIX. of 1853.

The voluntary appearance of a party in Court is an indication, that it would not be repugnant to his feelings to be examined on oath or affirmation.

SECTION 162.

Special application to be made for the examination of a party as a witness.

If any party to a suit shall require to enforce the attendance of any other party thereto as a witness, he shall, by himself or his pleader, make a special application to the Court for an order requiring the attendance of the party, and shall show, to the satisfaction of the Court, sufficient grounds in support of such application; otherwise a summons shall not be issued.*

Vide Section 8, Act XIX. of 1853.

When the party whose attendance is to be enforced is of the higher classes, it is presumable that he shares in the general sentiments of natives on the subject. The Legislature, considering that their "prejudices, however unreasonable, require consideration," have authorised the Government altogether to exempt persons of rank from attendance in the Courts, and, for other respectable persons, have provided a preliminary inquiry, to elicit whether the application for the attendance of such is made solely for obtaining the best evidence, or for fraudulent or other improper purposes, and, if so, whether there exist such objections to personal appearance as the Courts are required, by the spirit of these rules, to respect.

When the summons to the defendant is for the final disposal of the case, the special application under this Section may be made at the time of the issue of summons or soon after. In other cases it may be made after the settlement of issues, under Section 149.

SECTION 163.

The Court may first issue a notice to show cause.

The Court, if it think fit, may, before making such order, cause notice to be given to the party or his pleader, fixing a day for such party to show cause why he should not attend and give evidence; and may also, from time to time, if necessary, for good and sufficient reason, enlarge the time for such purpose.

* The rule in Section 42 is opposed to the provisions of this and the following Sections. The framers of it failed to observe its inconsistency with subsequent provisions in the Code as above, (taken from the Act mentioned in the text,) which are suited to the state of society in this country. A rule so harsh and inconsistent as that, and so liable to abuse, (vide comments of the Calcutta Sudder Court thereon,) cannot be too soon expunged from this Code.

The object of Section 42 was stated to be the *importance* of "confronting both parties in the presence of the Judge at the commencement of the suit," *i. e.* for settling the issues. But as the settlement of issues is to be obtained by the use of the rules of pleading, which as observed by Mr. Cameron, are "purely logical in their nature," it is obvious that no advantage can be gained either by the personal appearance of the parties or their examination on oath or solemn affirmation. The practice of *actual* and *personal appearance* in open Court, which obtained in uncivilised states of society, has almost every where given place to that of appearance by advocates, whose knowledge of "the science of pleading" qualifies them for the settlement of issues. To require the attendance of parties for a purpose so useless cannot but tend to confirm the general aversion to attendance in the Courts.

Vide Section 9, Act XIX. of 1853.

There is reason to believe that the provisions of the former law, for compelling the attendance of parties to give evidence, were abused to a certain extent, notwithstanding the precautionary instructions laid down by the Calcutta Sudder Court in their Circular Order of 28th February 1851. They were used as an instrument of harassing parties of high rank and station, who, from their ignorance of the facts, were totally incapable of throwing any light on the case. It is expected that the Courts will be particularly careful how they enforce the attendance of parties to a suit to give evidence.

SECTION 164.

In support of the cause shown, the Court shall receive any declaration in writing of the party, on unstampt paper, if signed by him and verified in the manner hereinbefore provided for the verification of plaints, and delivered into the Court by himself or his pleader.

Court shall receive a written declaration in support of the cause shown.

SECTION 165.

If no sufficient cause be shown on the day fixed, or upon any subsequent day to which the Court shall enlarge the time for that purpose, the Court shall issue its order requiring the party to attend and give evidence.

If no sufficient cause be shown, summons to issue.

Vide Sections 10 and 11 of Act XIX. of 1853.

The declaration in writing, showing cause why a party should not attend and give evidence, must be signed and verified as prescribed in Section 27. "By himself," *i. e.* including his recognised agent.

A form of declaration will be found in the Appendix.

"Shall issue its order," *i. e.*, if the objections urged by the party be overruled.

SECTION 166.

If the Court shall think it necessary for the ends of justice to examine any party to the suit, or to inspect any document in his possession or power, the Court may, of its own accord, in any stage of the suit, cause such party to be summoned to attend as a witness to give evidence, or produce such document if in his possession or power, on a day to be appointed in the summons, and may examine such party as a witness in open Court, or may cause such party to be examined in such other manner as the Court may direct.

Court may of its own accord at any time summon any party as a witness, or require him to produce documents.

This generally corresponds with Section 35, Act XIX. of 1853. It empowers the Court, at any stage of a suit, to summon a party to give evidence or produce a document.

The Bombay Sudder Court, ruled, 3rd April 1860, that the expense of summoning a party at the instance of the Court should at first be borne by the plaintiff, and charged among other costs in the suit. The Madras Sudder Court ruled the same, 1st October 1860.*

A similar provision in regard to persons not parties to a suit, who may be present in Court, will be found in Section 171.

Since the issue of the second edition of this work, the Legislature have empowered the Courts (see Section 171*a*) to summon any persons, of their own accord, and thus re-established the former law, and taken it out of the power of the parties to offer such evidence as they thought necessary.

The penalty for default under this Section will be found in Section 170.

"Cause such party to be summoned," after giving him an opportunity, agreeably to the provision of Section 163, "to show cause why he should not attend and give evidence," such as his want of personal knowledge of the subject of suit.

"Cause such party to be examined in such other manner," that is, by commission.

The summons under this Section is to be served in the same manner as on a witness under Section 155. If the party have appeared by pleader or recognised agent, service upon such person will be sufficient.

Attendance of Witnesses and Consequence of Non-attendance.

SECTION 167.

Persons summoned to give evidence must attend.

Any person, who shall be summoned to appear and give evidence in a suit, shall be bound to attend at the time and place named in the summons for that purpose.

Refers to parties to a suit and others.

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* This ruling is liable to the objection that the plaintiff may be averse to the issue of the order of the Court, from a conviction that further evidence is not requisite or may not be for his interests. As Section 171*a* provides that the expense of serving summonses, under it, are to be advanced by the Collector, the Sudder Courts will probably adopt the same mode with regard to summonses under this Section, in those cases where the party may not be represented by a pleader or agent, empowered to receive them.

SECTION 168.

Consequences of non-attendance by a witness.

If any person, on whom any summons to give evidence or produce a document shall have been served in either of the ways specified in Section 155, shall, without lawful excuse, fail to comply with the summons, the Court may order such person to be apprehended and brought before the Court. If such person abscond or keep out of the way, so that he cannot be apprehended or brought before the Court, his property shall be liable to attachment and sale, in the manner and subject to the rules provided in Sections 159 and 160, with respect to a witness or other person on whom the service of a summons cannot be effected.

"Without lawful excuse," *i. e.* such as sickness, exemption under Section 22, being a Hindoo or Mahomedan woman of rank, or residing at the time at a distance of more than 100 miles from the Court. This Section refers to witnesses not parties to a suit, who have been served with summonses under Section 155. *Vide* remarks on Sections 159 and 160. The penalties prescribed in those Sections are to follow default under this. The penalty for non-attendance (Section 174 of the Penal Code) is the same as for absconding to avoid service of summons, stated under Section 160 of this Code.

SECTION 169.

Consequences of refusal to give evidence.

If any witness, attending or being present in Court, shall, without lawful excuse, refuse to give evidence or to produce any document in his custody or possession named in such summons as aforesaid, upon being required by the Court so to do, the Court may commit such witness to close custody for such reasonable time as it may deem proper, unless he shall, in the mean time, consent to give his evidence or to produce the document. If after the expiration of such time the witness shall persist in his refusal, the Court may proceed to deal with him according to the provisions of any law, for the time being in force, for the punishment of persons refusing to give evidence.

"Any witness attending or being present in Court," *i. e.* attending pursuant to summons, or casually present.* This

* It is in rare cases that mere bystanders can give evidence pertinent to the suit under trial. Witnesses attending at the request of the parties without summons, are rather to be understood.

"The Court may (the Select Committee reported) receive the evidence of such witnesses as choose voluntarily to attend" on behalf of the parties. This is alluded to in Section 145, as a means of enabling the Court to decide a suit at the first hearing, though the summons have been only for the settlement of issues. It has been remarked that there should have been some "rule in the Act for informing parties that they are at liberty to produce their witnesses at the first hearing, and that, owing to the want of it, but few cases will be decided on a first hearing."

Section does not include parties to a suit. The recusant witness under this Section may be committed to close custody for a reasonable time. If, after the expiration of that time, he still persist in his refusal, he may be punished according to law. The law heretofore in similar cases was Section 24, Act XIX. of 1853. Under this Section, a fine not exceeding 500 rupees is to be imposed, realisable by attachment and sale of the property of the recusant witness. By that law the Court could commit a recusant witness to custody until he consented to give evidence or produce the document required. By this Code the confinement should extend to a reasonable time only.

SECTION 170.

Consequence of non-attendance or refusal of a party to the suit to give evidence.

If any person, being a party to the suit, who shall be ordered* to attend to give evidence or produce a document, shall, without lawful excuse, fail to comply with such order, or, attending or being present in Court, shall, without lawful excuse, refuse to give evidence or to produce any document in his custody or possession named in such summons as aforesaid, upon being required by the Court so to do, the Court may either pass judgment against the party so failing or refusing, or make such other order in relation to the suit as the Court may deem proper in the circumstances of the case.

This Section refers to a defaulting or recusant party to a suit. The procedure under this Section is, for obvious reasons, similar to that prescribed in Section 126. Where a party defaults or is recusant, the policy of the law is to deal with him in a manner different from other witnesses. There is no reason why a party, while resisting the authority of the Court, should be allowed to seek further assistance from it.† Hence the power given to the Court, by this Code, to deal as it may see fit with the suit of such party, is tantamount to the infliction of a penalty.

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* The *order* is not for the purpose contemplated by Section 42, *i e* the settlement of issues, but for taking evidence. It is not necessary to *attend*, in order to produce documents, as Section 153 allows an agent or vakeel to be employed for the purpose.

† It is to be observed, however, that the defendant is dragged into Court, perhaps upon a false claim, got up (as remarked by the Select Committee) by some "dishonest person speculating upon his reluctance to appear in Court," from religious or social prejudices. It is optional to the plaintiff to sue or not, according as he may or may not be willing to give evidence or produce documents in his possession; and he has no right to call upon the defendant to supply the deficiency in the proofs of his claim. The provision of this Section, therefore, however applicable to a plaintiff, is unjust as regards the defendant. See the note on Section 126.

SECTION 171.

Any person present in Court may be called upon to give evidence, though not summoned.

Any person present in Court, whether a party to the suit or not, may be called upon by the Court to give evidence and to produce any document then and there in his actual possession or in his power, in the same manner and subject to the same rules as if he had been summoned to attend and give evidence or to produce such document, and shall be liable to be dealt with by the Court as a party or witness, as the case may be, would, under any of the preceding provisions, be liable to be dealt with for any refusal to obey the order of the Court.

Vide Section 25, Act XIX. of 1853.

This refers to persons, whether parties to a suit or not, who may be present in Court, but not summoned. If a party to a suit, he will be proceeded against under Section 170; if not, Section 169 will apply.

SECTION 171*a*.

[Section 9, Act XXIII. of 1861.]

Court may of its own accord summon witnesses.

If the Court shall at any time think it necessary for the ends of justice to examine any person, other than a party to the suit and not named as a witness by a party to the suit, the Court may, of its own accord, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession on a day to be appointed, and may examine such person as a witness. The costs of summoning such person, if not deposited by either party to the suit, shall be paid by the Collector under an order of the Court, and shall be costs in the suit, and shall be paid out of any money recovered on account of costs in the suit, whether at the instance of the Government or of either party, before any other costs in the suit are paid.

In the former editions it had been remarked that this Code had abrogated the power, which had been given to the Courts by Section 35, Act XIX. of 1853, in regard to the summoning of persons as witnesses who had not been cited by the parties to the suit, or not present in Court, and that it enabled them to call upon such persons only to give evidence as might be present in Court. This restriction, it was added, could hardly tend to any inconvenience or impediment to the administration of justice, as it was to be expected that the parties to a suit would come prepared with sufficient evidence in support of their respective pleas, and the power of postponing for fresh evidence tended in general to the protraction of suits. Moreover, where further evidence was attainable and considered desirable by the parties, the Court was at liberty to act upon their application. The old law abovementioned has, however, been revived by the preceding Section. The

provision thus made may be of use in those cases (and probably only in those) where the Court may have reason to believe the suit to be a collusive one, instituted with a view to defraud some third party (such as a minor or a widow) of his rights, and the litigants cannot be expected to adduce disinterested testimony, by which their fraudulent purposes would be frustrated.

In general, the power given to the Courts to summon either the parties or any other persons whatever, to give evidence, is unnecessary and liable to be abused. The parties are the best judges as to the evidence required on their behalf, and may be safely left to follow the dictates of their interests. The Courts can only conjecture what is best for the interest of either party or the ends of justice; and their attempts to use this power will result in most cases in the protraction of suits and harassment of suitors.

When and how Witnesses are to be examined.

SECTION 172.

On the day appointed for the hearing of the suit, or on some other day to which the hearing may be adjourned, the evidence of the witnesses in attendance shall be taken orally in open Court, in the presence and hearing and under the personal direction and superintendence of the judge. In cases in which an appeal lies to a higher tribunal, the evidence of each witness given upon such examination shall be taken down in writing, in the language in ordinary use in proceedings before the Court, by or in the presence and under the personal direction and superintendence of the judge, not ordinarily in the form of question and answer, but in that of a narrative, and when completed, shall be read over in the presence of the judge and of the witness, and also in the presence of the parties to the suit, or their pleaders or such of them as are in attendance, and shall, if necessary, be corrected, and shall be signed by the judge. If the evidence be taken down in a different language from that in which it has been given, and the witness does not understand the language in which it is taken down, the witness may require his deposition, as taken down in writing, to be interpreted to him in the language in which it was given. Where all the parties to the suit present, and the pleaders of such as are absent, consent to have such evidence as is given in English taken down in English, the judge may so take it down in his own hand. It shall be in the discretion of the Court to take down, or cause to be taken down, any particular question and answer, if there shall appear any special reason for so doing, or any party or his pleaders shall require it. If any question put to a witness be objected to by either of the parties or their pleaders, and the Court shall allow the same to be put, the question and

Witnesses to be examined at the hearing of the suit in open Court.

In what form evidence shall be taken in appealable cases.

In what case a witness may require his deposition to be interpreted to him.

When evidence may be taken in English.

Objection made to questions.

answer shall be taken down, and the objection, and the name of the party making it, shall be noticed in taking down the depositions, together with the decision of the Court upon the objection. The Court shall record such remarks as it may think material respecting the demeanor of the witness while under examination. In cases in which the evidence is not taken down in writing by the judge himself, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the judge with his own hand and shall accompany the record. In cases in which an appeal does not lie to a higher tribunal, it shall not be necessary to take down the depositions of the witnesses in writing at length; but the judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what such witness deposes, and such memorandum shall be written and signed by the judge with his own hand, and shall form part of the record. If the judge shall be prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and in cases not appealable, shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record.

Memorandum of substance of the evidence to be made by judge as each witness is examined.

In what form evidence shall be taken in cases not appealable.

If judge be unable to make a memorandum of the evidence, reason of inability to be recorded.

The Section was enacted with a view to a proposed alteration in the law, rendering final the decisions of the Courts in suits below a certain amount, 50 Rupees. Hence the use of the words "in cases in which an appeal lies to a higher tribunal," and the addition of a new Clause at the end with reference to cases not appealable. The provision of this Section, in its main feature, is similar to what is laid down in Section 31, Act XIX. of 1853.

Since the foregoing remarks were written, Small Cause Courts have been established, by Act XLII. of 1860, in several places in the Mofussil, to whom the latter part of the Section is applicable. See the Act in the Appendix and the remarks on the anomaly of suits of the same character and amount or value being appealable or not, according as they are tried in the ordinary Civil Courts, or the Small Cause Courts.*

The rules for taking down depositions of witnesses in appealable cases under the former law were as follows.

1. Evidence to be given orally and in open Court.
2. To be taken down in writing by, or in the presence

* See the Section of Act XLIII. of 1860, under Section 372 of this Code, which prohibits special appeals from the decisions of the appellate Courts, in cases of the nature of those cognizable by the Mofussil Small Cause Courts.

and hearing, and personal direction and superintendence of the judge.

3. To be taken down in the form of a narrative.

4. To be read over to the witness and signed by him before the judge and parties.

5. When witness refuses to sign, reasons of his refusal to be recorded.

6. The judge may take down any particular question or answer at his discretion, or at the instance of a party.

7. If objection be made to any question, the judge to decide as to its propriety, and, if put, to note the objection and the objecting party.

The following are the additions and alterations introduced by the new Code.

1. The depositions are not to be signed by the deponent, but by the judge, who shall correct the same if necessary.

2. The deposition is to be taken in the language ordinarily in use in the Court.

3. It is to be read over in the presence of the witness, the judge, and such of the parties or their pleaders as are present.

4. By consent of the parties, depositions given in English may be taken down in that language.

5. If the deposition be taken down in a language which the deponent does not understand, he may require it to be interpreted to him.

6. When the deposition is not taken down by the judge himself, he is to make a memorandum of the substance of the examination, to be signed by him and made a part of the record.

The last two sentences of this Section refer to cases in which appeals may not be allowed.

The Bombay Sudder Court observed, 28th June 1860:

"The signature of a witness to his deposition is no longer necessary.

"Depositions must be formally taken down in *ex-parte* cases.

"If a witness does not understand the language of the Court, the interpreter who may be employed must be sworn or put on solemn affirmation before he begins to interpret.

"Remarks as to the demeanor of a witness should be made at the foot of his deposition.

"When any question is objected to, and the Court allows it to be put, the objection and the Court's decision should be noted in the body of the *deposition*."

"47. The lower Courts should pay particular attention to the rule in Section 172, which requires that all evidence shall be taken under the personal superintendence of the judge, and that, if he does not write it down himself, he shall make a memorandum of the substance, which he shall sign and file with the record, recording the reason of his inability whenever he is unable to do so. The zillah judges will take notice of all violations of this rule which come under their notice."—*S. C. Cir. Or., 29th July* 1859.

The Bombay Sudder Court, on the 12th October 1860, issued the following rules, under Section 381 of this Code, relating to the examination of witnesses in civil suits :—

1. Every witness, before being examined, must be called on to make solemn affirmation, affirmation, or oath, as required by law.

2. The deposition of each witness shall commence as follows :—

"I do hereby state, on solemn affirmation (or affirmation, or oath, as the case may be), that my name is ————, my father's (or husband's name) ————, my caste (or race) ————, my age about ————, my occupation ————, my residence ————."

3. The Judge's signature to each deposition (required by Section 172 of the Code) shall be in the following form and shall be written at the foot of the deposition :—

"Deposed before me on (solemn affirmation, affirmation, or oath, as the case may be) this (date)."

(Name of Judge) ————,

(Designation of Judge) ————,

These rules supersede the Court's Circular No. 632, of the 17th April 1841.

SECTION 173.

A witness may for sufficient cause be examined immediately.

If a witness be about to leave the jurisdiction of the Court, or other good and sufficient cause can be shown to the satisfaction of the Court why his examination should be taken immediately, it shall be competent to the Court, upon the application of either party, or of the witness, at any time after the institution of the suit, to take the examination of

such witness forthwith, or on any day that may be fixed for that purpose, of which due notice shall be given to the parties if the day be fixed in their absence. The witness shall be examined, and his deposition shall be taken down in writing, in the manner hereinbefore prescribed; and the deposition so taken down may be read in evidence at any hearing of the suit.

This is a rule unknown to the former practice of the Court. Formerly, whatever might be the urgency, a witness could not be examined before settlement of issues. Failure of justice occasionally occurred by the death of a witness, or his departure from the country, at an early stage of the suit. A witness may now be examined at any time after the institution of a suit, at the instance of a party, or at his own request. It was in contemplation to lay down rules for the perpetuation of evidence, by enabling the Civil Courts to examine witnesses, at the instance of persons interested in their examination, before the institution of any suit. The idea was probably given up, as the process was considered to be *preliminary* to a suit, and therefore not strictly coming within the scope of a Code of Procedure having reference to a suit from its institution to its termination.

"Application of the witness." Held by the Bombay Sudder Court, 28th June 1860: "If a witness, in the absence of the parties, make the application, he must, in the first instance, bear the expense of the stamp, and pay the fees for service of notice on the parties. It will subsequently be discretionary with the Court to charge these costs on the parties, or leave them on the witness, as may be judged proper."

SECTION 174.

All witnesses shall be examined upon oath or affirmation, or otherwise, according to the provisions of the law, for the time being in force, in relation to the examination of witnesses.

Witness to be examined upon oath or affirmation, according to the law in force.

The present law applicable to civil suits is Act V. of 1840.*

* The Royal Commissioners proposed to "dispense with oaths and affirmations altogether." The Local Legislature, though concurring at first in the foregoing opinion, judged it proper to retain the existing law, in compliance, it is supposed, with a suggestion of the Home Authorities.

Though the verification of plaints and statements is declared by Section 24 to be punishable, when proved to be false, the rule in Section 139 "releases the parties from the obligation of truth and consistency," and forbids "the breach of that obligation from being visited with its proper consequences." This affords a strong reason for removing those rules for the attendance and examination of parties, which disgust those who are subjected to them, while no adequate benefit can be expected from their enforcement.

SECTION 174 *a*.

[Section 16, Act XXIII. of 1861.]

Procedure when certain offences, under Chapter XI. of the Penal Code, are committed in any case pending before any Court.

When, in any case pending before any Court, any witness or other person shall appear to the Court to have been guilty of an offence described in Section 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, or 210, of the Indian Penal Code,* the Court may commit such person to take his trial for the offence before the Court of Session, or, after making such preliminary inquiry as may be necessary, may send the case for investigation to any Magistrate having jurisdiction to try or commit for trial the accused person for the offence charged, and such Magistrate shall thereupon proceed according to law.

SECTION 174 *b*.

[Section 17, Act XXIII. of 1861.]

Court may take bail and bind over witnesses to give evidence.

The Court may send the person accused in custody, or take sufficient bail for his appearance before the Magistrate, and may bind over any person to appear and give evidence before the Magistrate.

SECTION 174 *c*.

[Section 18, Act XXIII. of 1861.]

How the charge is to be framed.

When the commitment is made by the Court, the Court shall frame a charge in the manner provided in Chapter XIII. of the Code of Criminal Procedure, and shall transmit the same, with the order of commitment and the record of the case, to the Magistrate; and such Magistrate shall bring the case, together with the witnesses for the prosecution and defence, before the Court of Session.

SECTION 174 *d*.

[Section 19, Act XXIII. of 1861.]

Procedure in case of certain offences relating to documents.

When, in any case pending before any Court, there shall appear to the Court sufficient ground for sending, for investigation, to the Magistrate, a charge described in Section 463, 471, 475, or 476 of the Indian Penal Code,† which may be preferred in respect to any

* The following are the subjects of these Sections:
193. False evidence.
194. False or fabricated evidence to procure conviction of a capital crime.
195. False or fabricated evidence to procure conviction of a minor crime.
196. Use of false or fabricated evidence.
199. False declaration.
200. Use of false declaration.
205. False personation.
206. Fraudulent concealment of property.
207. Fraudulent claim to property.
208. Fraud in suffering a decree to be passed or executed.
209. Fraudulent suit.
210. Fraud in getting a decree to be passed or executed.

† 463. Forgery.
471. Uttering of a forged document.
475. Counterfeit devices or marks.
476. Fraudulent destruction of documents.

deed or paper offered in evidence in the case, the Court may send the person accused in custody to the Magistrate, or take sufficient bail for his appearance before the Magistrate. The Court shall send to the Magistrate the evidence and documents relevant to the charge, and shall bind over any person to appear and give evidence before such Magistrate. The Magistrate shall receive such charge, and proceed with it under the rules for the time being in force.

SECTION 174 *e*.

[Section 20, Act XXIII. of 1861.]

Procedure in case person accused under Section 16 or 19 is a European British subject.

If the person accused or any one of the persons accused in any case falling under Section 16 or Section 19 of this Act, [Section 174 *a* or Section 174 *d*,] is a European British subject, the Court shall send such person in custody, or take sufficient bail for his appearance before an officer empowered to commit, or hold to bail, persons charged with offences for trial before a Supreme Court of Judicature, and such officers shall proceed according to law.

SECTION 174 *f*.

[Section 21, Act XXIII. of 1861.]

Procedure in certain cases of contempt.

When any such offence as is described in Section 175, 178, 179, 180, or 228 of the Indian Penal Code,* is committed in the view or presence of any Court, it shall be competent to such Court to cause the offender, whether he be a European British subject or not, to be detained in custody, and, at any time before the rising of the Court on the same day, to take cognisance of the offence, and to adjudge the offender to punishment by fine not exceeding two hundred Rupees, or by imprisonment in the civil jail for a period not exceeding one month, unless such fine be sooner paid. In every such case the Court shall record the facts constituting the contempt, with any statement the offender may make, as well as the finding and sentence. If the Court, in any case, shall consider that a person accused of any offence above referred to should be imprisoned, or that a fine exceeding two hundred Rupees should be imposed upon him, such Court, after recording the facts constituting the contempt, and the statement of the accused person as before provided, shall forward the case to a Magistrate, or, if the accused person be a European British subject, to a Justice of the Peace, and shall cause bail to be taken for the appearance of such accused person before such Magistrate or Justice of the Peace, or, if sufficient bail be not tendered, shall cause the accused person to be forwarded under custody to such Magistrate or Justice of the Peace. If the case be forwarded to a Magistrate, such Magistrate shall proceed to try the accused person, in the manner provided for trials before a Magistrate; and it shall be competent to such Magistrate to adjudge such offender to

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* 175. Omission to produce documents.
178. Refusal to take oath.
179. Refusal to answer questions.
180. Refusal to sign statements.
228. Contempt of Court

N. B.—The undermentioned Sections should have been included:
172. Absconding to avoid service of summons.
174. Non-attendance on summons.

punishment, as provided in the Section of the Indian Penal Code under which he is charged. If the case be forwarded to a Justice of the Peace, such Justice of the Peace shall inquire into the circumstances, and shall have the same powers of punishing the offender as are vested, by the Statute 53 George III. c. 155, s. 105, in a Justice of the Peace, for the punishment of an assault, and may deal with the offender in the same manner as is provided in that behalf in the said Statute. If such Justice of the Peace shall consider the offence to require a more severe punishment than a Justice of the Peace is competent to award under the said Statute, he may commit the offender to a Supreme Court of Judicature.

SECTION 174 *g*.

[Section 22, Act XXIII. of 1861]

Discharge of an offender on his submission.

When any person has been sentenced to punishment under the last preceding Section, for refusing or omitting to do anything which he was lawfully required to do, it shall be competent to the Court to discharge the offender, or to remit the punishment, on the submission of the offender to the order or requisition of such Court.

The foregoing Sections (which properly form part of the Code of Criminal Procedure) are designed to indicate the measures to be taken by the Judges of Civil Courts, for the punishment of various acts of a fraudulent nature, subversive of rights to property or obstructive of the course of civil justice. The references made in them to Sections of the Indian Penal Code would imply that the offences came under the cognisance of the Criminal Courts. The offence *(e. g.)* of giving or fabricating false evidence, with a view to the conviction of a person of an offence liable to be punished capitally or with transportation for life, can certainly never be committed in a Civil Court. Nor is it apparent why a person who has been guilty of contempt of the Civil Court, or one who refuses to deliver up a document to such Court, should be sent to the Criminal Courts for punishment. The haste with which the Indian Penal Code was ushered into the world may be the cause of these and other anomalies in those Sections. It would be useless to enter into details regarding them, as past experience does not justify the expectation of such rules as these, or even that of Section 24 of this Code, which refers to a purely civil act, being acted upon, except in solitary cases or extraordinary occasions.

Of Commissions to examine Absent Witnesses and make Local Inquiries.

SECTION 175.

Cases in which Court may issue a commission to examine witnesses.

When the evidence of a witness is required who is resident at some place distant more than a hundred miles from the place where the Court is held, or who is unable from sickness or infirmity to attend before the Court to be personally examined, or is a person exempted by reason of rank or sex from personal appearance in Court, the Court may, of its own motion, or on the application of any of the parties to the suit, or on the representation of the witness, order a commission to issue for the examination of such witness on interrogatories or otherwise; and may, by the same or any subsequent order, give all such directions for taking such examinations as may appear reasonable and just. If the witness be resident within the jurisdiction of the Court issuing the commission, the commission may be issued to any officer of the Court, or to any subordinate Court, or to any other person or persons whom the Court issuing the commission may think proper to appoint. If the witness be resident at some place which is beyond the jurisdiction of the Court issuing the commission, [and not within the local jurisdiction of Her Majesty's Supreme Courts,]* but within the jurisdiction of the Sudder Court, the commission shall ordinarily be issued to the Court within whose jurisdiction the witness may reside, and which can most conveniently execute the same; but, under special circumstances, the commission may be issued to any other person or persons whom the Court issuing the commission may think proper to appoint.

When the witness resides within the Court's jurisdiction.

When the witness resides beyond the Court's jurisdiction, and not within the Supreme Court's jurisdiction, but within the jurisdiction of the Sudder Court.

The rules here laid down for the examination of absent witnesses are an improvement on the former procedure. Heretofore, a witness residing in Europe, or other foreign country, could not be examined. The contingency is now provided for.

The provisions of Sections 175 to 179, relating to the examination of absent witnesses, may be summed up as follows.

A witness may be examined by commission—

1. If he be a resident of some place distant more than 100 miles from where the Court is held, whether such place be within the jurisdiction of the Court issuing the commission, or beyond it, but within the jurisdiction of the Sudder Court to which such Court is subordinate.

* The words within brackets are not applicable, since the amalgamation of the Supreme and Sudder Courts.

2. If he be unable from sickness or infirmity to attend the Court.

3. If he or she be exempted by reason of sex or rank, under Section 21 or 22.

4. If he be a resident of some place beyond the jurisdiction of the High Court, but within the British territories in India, or within the territories of some native prince or state in alliance with the British Government.

5. If he be a resident of some place beyond the British territories in India, and not within the territories of a native prince or state in alliance with the British Government.

In cases coming within the scope of the fourth and fifth heads, the Courts will not issue a commission, unless satisfied that the evidence of the witness required to be examined by commission is material to the just determination of the suit. This restriction does not extend to the subjects of the other heads.

Besides issuing the commission to any of its officers or to any Court mentioned in these Sections, the Court may, in its discretion, issue the commission in the name of any person or persons whom it may think proper to appoint.

If the witness reside within a hundred miles of the Court in which his evidence is required, but beyond its jurisdiction, and within that of some other Court, both being subordinate to the same Sudder or High Court, he is not exempted from personal attendance. For instance, a witness resident at Barrackpore, within the 24-Pergunnahs, but within 100 miles from Hooghly, cannot claim to be examined by commission, if cited to give evidence at the latter place.

See, under Section 177, the Bombay Sudder Court's ruling of the 28th June 1860.

The Bombay Sudder Court remarked, 28th June 1860, that there is no provision, for requiring a solemn affirmation from a commissioner appointed under this Section to take evidence, or under Section 181, to examine accounts, though the Courts are authorised to examine a commissioner appointed under Section 180, to make a local investigation.

That commissioners, under this Section, are not to make solemn affirmation on appointment, may be inferred from the appointment of such under Section 177, in native allied states, where there may be no Courts qualified to administer it.

SECTION 176.

When the witness is within the local jurisdiction of the Supreme Court.

If the witness be resident [within the local jurisdiction of Her Majesty's Supreme Court,]* the commission shall ordinarily be issued to the Court of Small Causes held under Act IX. of 1850, *(for the more easy recovery of small debts and demands in Calcutta, Madras, and Bombay,)* but may, under special circumstances, be directed to any person or persons whom the Court issuing the commission may think proper to appoint.

SECTION 177.

When the witness is not within the jurisdiction of the Sudder Court or the Supreme Court, but within the British territories, or the territories of any native prince or state in alliance with the British Government.

When the evidence of a witness is required, who is resident at some place not within the jurisdiction of the Sudder Court or of [Her Majesty's Supreme]† Court, but within the British territories in India, or within the territories of a native prince or state in alliance with the British Government, the Court, if it be satisfied that the evidence of such witness is necessary, may, of its own motion, or on the representation of any of the parties to the suit, issue a commission for the examination of the witness; provided that, if the suit be pending in any Court subordinate to the principal Civil Court of a district, such subordinate Court shall not issue the commission, but the principal Civil Court of the district may issue the commission on the application of the subordinate Court.

The commission may issue to any Court, officer, or other person whom the principal Court of the district may think proper to appoint, although the suit may be pending in a subordinate Court. The latter Court, in such cases, will make a reference to such principal Court.

"Representation." The Bombay Sudder Court held, 28th June 1860, that "all applications by parties for commissions to examine absent witnesses should be on stampt paper."

SECTION 178.

When the witness is beyond the said territories and not within the territories of any native prince or state in alliance with the British Government.

When the evidence of a witness is required, who is resident at some place beyond the said territories, and not within the territories of a native prince or state in alliance with the British Government, the Sudder Court,‡ if the suit in which the evidence of the witness is required be pending in that Court, and the Court be satisfied that such evidence is necessary, may, of its own motion or on the application of any of the parties to the suit, issue a commission to examine the witness; if the suit be not pending in the Sudder Court,‡ that Court may issue the commission on application of the Court in which the suit is pending. In

* In Calcutta. † The High. ‡ Or High Court.

all such cases the commission may be issued to any person or persons whom the Sudder Court* may think proper to appoint.

A commission may be issued under this Section to some person or persons whom the Sudder or High Court may think fit to appoint. It is not expected that foreign Courts will act on the commissions issued from this country.

SECTION 179.

Commission to be returned to the Court issuing it, with the depositions of the witnesses.

After the commission has been duly executed, it shall be returned, together with the deposition of the witness who may have been examined thereunder, to the Court out of which the commission issued, unless otherwise directed by the order for issuing the commission; in which case it shall be returned in terms of such order, and the commission and the return thereto, and the deposition of the witness who may have been examined under such commission shall, in all cases, form part of the record of the suit.

When depositions may be read in evidence.

But no deposition taken under a commission shall be read in evidence, without the consent of the party against whom the same may be offered, unless it be proved that the deponent is beyond the jurisdiction of the Court, or dead, or unable, from sickness or infirmity, to attend to be personally examined, or distant, without collusion, more than a hundred miles from the place where the Court is held, or exempted by reason of rank or sex from personal appearance in Court, or unless the Court shall, at its discretion, dispense with the proof of any of the above circumstances, or shall authorise the deposition of any witness being read in evidence, notwithstanding proof that the causes for taking such deposition have ceased at the time of reading the same.

Except by consent, no deposition taken by commission can be read in evidence against a party, unless it be proved that the deponent is beyond the jurisdiction of the Court, as explained above, or dead, or unable, from sickness or infirmity, to attend the Court, or distant, without collusion, more than a hundred miles from the Court, or exempted by reason of rank or sex. The Court may, however, in its discretion, dispense with such proof, and order such deposition to be read in evidence, even though the causes for taking it by commission do not exist at the time it is read. A witness may be examined by commission, by the Court at its discretion, or on the application of either of the parties to the suit, or on the application of a witness to be so examined. The Court issuing the commission will authorise the Court or individual, to whom the commission is directed, to issue the usual summons upon the

* Or High Court.

witnesses, and fix a time for their attendance in Court, or other place, for their examination; such summons to be served under Section 155.

The Court issuing the commission may be certified from time to time regarding the progress of its execution, and shall pass thereupon the necessary orders for the guidance of the Court or person executing the commission. For instance, where a witness, whether a party to the suit or not, fails to attend and give evidence after being served with the summons, or absconds or keeps out of the way, so that the summons cannot be served upon him, he is liable to the penalties prescribed in Sections 159, 160, 168, 169, and 170, as the case may be, and may be proceeded against, as a defaulting witness, in the Court issuing the commission. As a commission for the examination of a witness is generally issued for his convenience, cases will rarely occur in which it will be necessary to enforce the penalties. These provisions are equally applicable to the case of production of documents.

SECTION 180.

Commission for local investigations.

In any suit or other judicial proceeding in which the Court may deem a local investigation to be requisite or proper, for the purpose of elucidating the matters in dispute, or of ascertaining the amount of any mesne profits or damages, the Court may issue a commission to an officer of the Court appointed to execute such commission, or, if there be no such officer, to any suitable person, directing him to make such investigation and to report thereon to the Court. In all such cases, unless otherwise directed by the order of appointment, the commissioner shall have power to examine any witnesses who may be produced to him by the parties or any of them, the parties themselves,* and any other persons whom he may think proper to call upon to give evidence in the matters referred to him; and also to call for and examine documents and other papers relevant to the subject of inquiry; and persons not attending on the requisition of the commissioner, or refusing to give their testimony or to produce any documents or other papers, shall be subject to the like disadvantages, penalties, and punishments, by order of the Court, on report of the commissioner, as they would incur for the same offences in suits tried before the Court. The commissioner, after such local inspection as he may deem necessary, and after reducing to writing, in the manner hereinbefore prescribed for taking the depositions of witnesses in the presence of the judge, the depositions taken by him, shall return the depositions, together with his report in writing, subscribed with his name, to the Court. The report and depositions shall be taken as evidence in the suit, and shall form part of the record; but it shall be competent to the Court, or to the parties to the suit, or any of them, with the permission of the

The report and depositions to be taken as evidence in the suit. Commissioner may be examined in person.

* Subject, of course, to the rules of Sections 162—166.

Court, to examine the commissioner personally in open Court, touching any of the matters referred to him or mentioned in his report, or the manner in which he may have conducted the investigation.

Where a plaintiff fails to appear before a commissioner, and the defendant appears, the plaintiff is subject to the penalty indicated in Section 114, *viz.* "the Court shall pass judgment against the plaintiff by default." Decision of the High Court, (present: Sir Barnes Peacock and two other Judges,) 14th July 1862.

There is no appeal from the judgment in such a case; and the proper course is to follow the procedure pointed out in Section 119, *viz.* to apply for an order to set aside the judgment, and, if that application be refused by the judge, to appeal against the order of refusal.—*Idem.*

"Persons not attending upon the requisition of the commissioner," applies to parties making default, whether required to give evidence or not.—*Idem.*

"Like disadvantage," is, in the case of a defendant, to have the local investigation proceeded with *ex-parte*, and, in the case of a plaintiff, to have his suit dismissed, with costs. But there is nothing in the Code to show that the commissioner may proceed *ex-parte* in default of the attendance of plaintiff.—*Idem.*

SECTION 181.

A commissioner may be appointed to investigate and adjust accounts.

In any suit or other judicial proceeding in which an investigation or adjustment of accounts may be necessary, it shall be lawful for the Court to appoint such officer, or other person, as aforesaid, to be a commissioner for the purpose of making such investigation or adjustment, and to direct that the parties or their attornies or pleaders shall attend upon the commissioner during such investigation or adjustment. In all such cases, the Court shall furnish the commissioner with such part of the proceedings and such detailed instructions as may appear necessary for his information and guidance; and the instructions shall distinctly specify whether the commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his investigation. The proceedings of the commissioner shall be received in evidence in the case, unless the Court may have reason to be dissatisfied with them, in which case the Court shall make such further inquiry as may be requisite, and shall pass such ultimate judgment or order as may appear to it to be right and proper in the circumstances of the case.

The provisions of these Sections supply a material defect in the former law. The administration of justice was greatly retarded by the limited power given to the ameen by Section 17, Regulation IV. of 1793, of the Bengal Code; and much

inconvenience to the public service resulted from the deputation of moonsiffs, under Sections 51 and 52, Regulation XXIII. of 1814, *idem*, to hold local investigations. The evils were partially remedied by the appointment of civil ameens under Act XII. of 1856. In many instances, under the old law, the Court had to assume the functions of a master on the equity side of the Supreme Court, in the adjustment of complicated accounts, which took up much of its time. Under these Sections the Courts are empowered to appoint commissioners, either from among its own officers, or other competent persons, and invest them with all the necessary power, for making local investigations of all kinds and adjusting accounts. The Court may, under Section 180, examine the commissioner appointed, or, under Section 181, reject his report, and order a fresh investigation by another commissioner, if it should think fit for the proper determination of the case.

"40. The authority conveyed in Sections 180 and 181 to appoint suitable persons to make local investigations, or to investigate accounts, and to charge their expenses to the party at whose instance and for whose benefit they are appointed, is a most valuable one; and it will be the fault of the Courts henceforward, if they employ any other than well-qualified and trustworthy persons to perform these duties."—*S. C. Cir. Or.*, 29*th July* 1859.

See, under Section 175, the Bombay Sudder Court's ruling, of the 28th June 1860.

SECTION 182.

Expenses of commission to be paid into Court before issue thereof.

Whenever a commission is issued, either for taking evidence, or for a local investigation, or an investigation into accounts, the Court, before issuing the commission, may order such sum, as may be thought reasonable for the expenses of the commission, to be paid into Court by the party at whose instance or for whose benefit the commission is issued.

This Section contains a provision for securing the costs of the commission issued under Sections 175, 180, and 181. The procedure is similar to what it was before the new Code came into operation. Where a commission is directed to a Court for taking evidence, such costs cannot be incurred. The expenses to be paid to witnesses are not included in these costs. These are costs due to the commissioners for their trouble.

The Calcutta Sudder Court held, 15th October 1859, that the commissioners are to be remunerated according to

the expenses actually incurred by them in each case, of which an estimate may be framed beforehand.

Held by the Madras Sudder Court, 1st October 1860: "The scale of remuneration is left to the Court's discretion, and will depend upon the circumstances of each case, such as the nature of the accounts, whether simple or complicated, whether voluminous or otherwise, the time required for their investigation, and the qualifications of the commissioner, a higher remuneration being necessarily payable if a professional person be employed."

Of Judgment and Decree.

SECTION 183.

When judgment is to be pronounced..

When the exhibits have been perused, the witnesses examined, and the parties heard in person or by their respective pleaders, the Court shall pronounce its judgment. The judgment shall be pronounced in open Court, either immediately or on some future day, of which due notice shall be given to the parties or their pleaders.

The difference between a judgment and a decree will appear from a comparison of this Section with Section 189. The judgments of the Sudder Court were generally delivered in the way indicated in the last sentence.

"Notice" may be orally given, the Bombay Sudder Court intimated, 28th June 1860, either to the vakeels of the parties, or to the parties themselves if they are present.

Held by the Madras Sudder Court, 11th June 1861: "The judgment is not to be pronounced in open Court, until it has been written in due form by the Judge and is ready to be placed on record. A mere note of the decision is not sufficient.—If, after a judge has left the Court, it be found that, in any suit brought to a final hearing, no written judgment has been placed on record by him, his successor must hear and decide the suit, notwithstanding that such absent judge may have pronounced judgment in the case and made a brief note of his decision."

SECTION 184.

Judgment to be written in the vernacular language of the judge.

Proviso.

The judgment shall be written in the vernacular language of the judge. Provided that, if the vernacular language of the judge be not English, and the judge be sufficiently conversant with the English language to be able to write a clear and intelligible decision in that language, and prefer to write his judgment in it, the judgment may be written in English.

Native judges, sufficiently versed in the English language, may write their judgments in the English language. Many of the native judges, it is presumed, will avail themselves of this privilege, as, besides the facility of expressing abstract legal ideas in that language, their judgments will be more intelligible to the English judges exercising appellate jurisdiction over them.

Held by the Madras Sudder Court, 15th December 1860, with reference to this and the six following Sections:

"The judgments and decrees of the Courts are to be distinct documents; and copies of the same, when applied for, are to be given separately.

"The judgment is to state the claim and defence, the nature of the exhibits, and the several particulars required by Sections 185, 186, and 187, or 359 of the Act; but is not to give any details of the costs, nor to be sealed.

"The decree is to state the matters required by Section 189 or 360, without adverting to any of the reasons or considerations detailed in the judgment, and is to contain a full statement of costs.

"No separate entry is to be made of the date on which the decree may be sealed and signed. The only date appearing in the decree is to be that on which judgment was pronounced, which ordinarily will be the day on which the suit is finally heard."

See, under Section 189, the Bombay Sudder Court's ruling, 28th June 1860.

SECTION 185.

Judgment what to contain.

Judgment when to be translated.

The judgment shall contain the point or points for determination, the decision thereupon, and the reasons for the decision, and shall be dated and signed by the judge in open Court at the time of pronouncing it. Whenever the judgment is written in any other language than that which is in ordinary use in the Court, the judgment shall be translated into the language in ordinary use in the Court, and the translation shall also be signed by the judge.

It has been usual for the judgment to be preceded by long statements of the acts of the parties, and even the arguments of the pleaders, which, though appropriate in reports, seem not to be required by the rule here prescribed.

SECTION 186.

Court to state its decision on each issue.—Proviso.

In all suits in which issues have been framed, the Court shall state its finding or decision on each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit.

SECTION 187.

Judgment to direct by whom costs are to be paid.

The judgment shall in all cases direct by whom the costs of each party are to be paid, whether by himself or by another party, and whether in whole or in what part or proportion; and the Court shall have full power to award and apportion costs in any manner it may deem proper.

The apportionment of costs is left entirely to the discretion of the Court. Where the costs are not cast upon the losing party, the reason for the exercise of the Court's discretion ought to be given in the judgment.

Held by the Madras Sudder Court, 1st October 1860: "The expenses of witnesses proving to have been summoned unnecessarily should be cast upon the party summoning them."*

SECTION 188.

What is included under the denomination of costs.

Under the denomination of costs are included the whole of the expenses necessarily incurred by either party on account of the suit, and in enforcing the decree passed therein, such as the expense of stamps, of summoning the defendants and witnesses, and of other processes, or of procuring copies of documents, fees of pleaders, charges of witnesses, and expenses of commissioners, either in taking evidence or in local investigations, or in investigations into accounts.

The instances given in this Section sufficiently show the nature of the items included in the general term of costs. They may be simply defined to be such expenses as are absolutely necessary for carrying on a suit. It was ruled by the Sudder Court that the cost of stamps for procuring copies of documents, for the purposes of a suit, cannot be awarded as costs. *Vide* the decision of the Sudder Court in the case of Ramguttee Dhur, *versus* Bykuntnath Chowdhree, decided on the 31st July 1856. This ruling may be considered to be superseded under this Code.

The new Code alters the practice, chiefly with advertence to the power given to the Courts of rejecting irrelevant

* See Agra Sudder Court's ruling, under Section 372, as to special appeals regarding improper award of costs.

exhibits prescribed in Section 129. Costs of copies will thus be limited to the copies of such exhibits only as are necessary for the due prosecution of the case. The decrees are to be of the nature of the decretal orders of the Supreme Court. The decree is not to contain the grounds of decision, which are to be given in the judgment under Section 185.

"50. The decree (Section 189) is, it will be seen, altogether distinct from the judgment, although it also must be signed by the judge. The form will be as follows :—

COURT OF THE PRINCIPAL SUDDER AMEEN OF THE 24-PERGUNNAHS.

Dated 20th August 1859.

No. 220 of 1859.

RADHAMOHUN BANERJEE, son of RAJKISSEN BANERJEE, inhabitant of Mouzah Andool, Pergunnah Myda, *Plaintiff*,

versus

RAJKISSEN BHUTTACHARJ, son of DENONATH BHUTTACHARJ, inhabitant of Rampore, Pergunnah Myda, *Defendant*.

Suit for (extract particulars of claim given in the register of the suit).

This cause coming on to be heard and debated this present day before Baboo ———————— Rai Bahadoor, Principal Sudder Ameen of Zillah 24-Pergunnahs, in the presence of Baboo Gour Doss Bysakh, counsel for the plaintiff, and Moonshee Abbas Alee, counsel for the defendant, (or if the parties appear in person, mention their names), and the evidence, oral and documentary, produced by the plaintiff and the defendant respectively having been heard, and due consideration having been given to what was alleged by the counsel (or by the parties) on both sides, the Court orders and decrees that (here state the decretal order in terms of the judgment; where costs are awarded, give a detail of the costs which either party is to pay; and insert the other particulars required by the 190th and following Sections of the Code).

Seal of Court. *Principal Sudder Ameen.*

The terms of the decretal order should be carefully studied before the decree is signed, and the directions should be precise, so that there may be no ambiguity."—*S. C. Cir. Or., 29th July* 1859.

SECTION 189.

Decree.

The decree shall bear date the day on which the judgment was passed. It shall contain the number of the suit, the names and description of the parties, and particulars of the claim, as stated in the register of the suit, and shall specify clearly the relief granted, or other determination of the suit. It shall also state the amount of costs incurred in the suit, and by what parties and in what proportions they are to be paid, and shall be signed by the judge and sealed with the seal of the Court.

Held by the Bombay Sudder Court, 28th June 1860: "The decrees only need be entered in the duftur. The judgments will be filed with the papers in each suit."

SECTION 190.

Decree for a portion of immovable property to specify boundaries.

When the suit is for land or other immovable property, with specified boundaries, if the decree be for the recovery of a portion only of such property, it shall specify the boundaries of the land or property adjudged.

To obviate disputes and mistakes in the execution of decrees, the boundaries of lands adjudged should be stated in them.

SECTION 191.

Decree for the delivery of movable property.

When the suit is for movable property, if the decree be for the delivery of such property, it shall also state the amount of money to be paid as an alternative if delivery cannot be had.

As for instance, in a suit for the recovery of jewels, the decree should state that the defendant do deliver over to the plaintiff the jewels mentioned in the plaint, and, in default of such delivery, within a given time from the date of the decree, the plaintiff will be entitled to receive from the defendant the sum of 200 Rupees in execution of the decree.

"Alternative." The use of this term, in this and the following Section, is not to be understood as giving an option to the defendant to avoid specific delivery or performance, by tendering a sum of money as an equivalent for the goods withheld or the damages sustained. The alternative is prescribed as a remedy where the Court cannot, by any of the means authorised by Section 200, enforce specific delivery or performance.

SECTION 192.

Decree for damages for breach of contract.

When the suit is for damages for breach of contract, if it appear that the defendant is able to perform the contract, the Court, with the consent of the plaintiff, may decree the specific performance of the contract within a time to be fixed by the Court, and in such case shall award an amount of damages to be paid as an alternative if the contract is not performed.

Where the suit is for damages, the Court cannot decree specific performance of the contract for the breach of which the damages are claimed, except with the consent of the plaintiff. Where the Court orders specific performance, it will always decree a sum of money in the shape of damages, if the contract be not performed, as in the preceding Section. For instance, in a suit by *B* for damages on the breach of a contract by *A* to build a house for him within a certain time, the Court may order *B*, with the consent of *A*, to finish the building within a time to be specified in such order, making, at the same time, an award for a specific amount of damages as an alternative relief.

SECTION 193.

[Repealed by Section 1, Act XXIII. of 1861, and re-enacted by Section 10, as follows.]

In suits for money, what interest to be awarded.

When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest, at such rate as the Court may think proper to be paid on the principal sum adjudged, from the date of suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the date of suit; with further interest, on the aggregate sum so adjudged and on the costs of the suit, from the date of the decree to the date of payment.

The defect in the original Section (193,) was pointed out in the former editions of this work. The omission has been supplied by the Legislature. The amended Section is explicit as to the award of interest for the period previous to the suit, as well as for the period the suit was pending, together with interest on the consolidated sum of principal, interest, and costs, decreed, till complete execution of the decree. The rate of interest is to be awarded according to the merits of each particular case. By the former practice the Courts were bound to allow 12 per cent.

SECTION 194.

Payments by instalments.

In all decrees for the payment of money, the Court may, for any sufficient reason, order that the amount shall be paid by instalments, with or without interest.

A provision in some respects similar to this was contained in Section 10, Regulation II. of 1800. It was obscurely worded, and was encumbered with conditions that rendered it almost inoperative. Where there was property, and the decree-holder consented "to waive his right of immediate enforcement," or "a short postponement of the sale" seemed just, an engagement for "gradual payment" was permitted. Where no property could be pointed out, an engagement might be accepted, "for the liquidation of the amount due, by instalments, within such period as the Court passing the final decree, or intrusted with the execution of it, deemed reasonable and proper." Under that rule the Calcutta Sudder Court held, 1st February 1833, that, by consent, it was competent to the Court "to order the Collector to hold the debtor's lands in attachment, collect the rents, and pay them into Court." This Code gives the Court the power to provide in the decree for payment by instalments, with or without interest, upon sufficient cause shown.*

SECTION 195.

If set-off be allowed.

If the defendant shall have been allowed to set-off any demand against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount (if any) is due to the defendant, and shall be for the recovery of any sum which shall appear to be due to either party. The decree of the Court with respect to any sum awarded to the defendant shall have the same effect, and be subject to the same rules, as if such sum had been claimed by the defendant in a separate suit against the plaintiff.

Effect of decree.

Vide remarks on Section 121.

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* Whether the debtor should immediately pay the whole amount decreed, or by instalments, can only be ascertained by an inquiry into the means he has—a principle applicable to all cases of money decrees for small sums, where the insolvency of the debtor is either apparent or presumable. "There can be no reason (as Dr. Johnson observed a century ago) why any debtor should be imprisoned, but that he may be compelled to payment; and a term should therefore be fixed, in which the creditor should exhibit his accusation of concealed property. If such property can be discovered, let it be given to the creditor: if the charge is not offered, or cannot be proved, let the prisoner be dismissed."

The circumstances under which "gradual payment" may be either allowed or disallowed, are not stated. As the matter is left altogether to the discretion of the Court, this provision is not calculated to work well. The disposition of judgment-debtors to evade payment of their debts must tend to frustrate all attempts to make arrangements under this Section by consent. Nor can any good be expected, unless there is a peremptory examination of the debtor as to his means of satisfying the decree, and the creditor is compelled to bring proofs on the point, instead of being allowed to demand that the debtor shall be imprisoned, and maintained in idleness, without either benefiting himself and his family by his labor or contributing thereby towards the discharge of his debt. See notes to Section 212 *et seq.*

SECTION 196.

When the suit is for land or other property paying rent, the Court may provide in the decree for the payment of mesne profits or rent on such land or other property, from the date of the suit until the date of delivery of possession to the decree-holder, with interest thereupon at such rate as the Court may think proper.

When the suit is for land, the Court may provide in the decree for payment of mesne profits, with interest.

SECTION 197.

When the suit is for land and for mesne profits which have accrued thereon during a period prior to the date of suit, and the amount of such profits is disputed, the Court may either determine the amount prior to passing a decree for the land, or may pass a decree for the land and reserve the inquiry into the amount of mesne profits for the execution of the decree, according as may appear most convenient.

Court may determine amount of mesne profits prior to passing decree, or may reserve inquiry.

These Sections provide for award of mesne profits *pendente lite* and those accruing before suit. Being decrees for money, interest is to be charged on both from date of suit. The ascertainment of mesne profits is generally left to take place in the course of execution of a decree. The Court may, however, in cases where mesne profits for any period antecedent to the suit is claimed, determine the amount before passing a decree, if it should think proper or expedient.

SECTION 198.

Certified copies of the decree and judgment shall be furnished to the parties or their pleaders, on application to the Court, and on the production of the necessary stamps where stamps are required by any law for the time being in force. The application may be made either orally or by writing on unstampt paper.

Certified copies of the decree and judgment to be furnished.

Under the practice which prevailed, no formal application was necessary, and the parties received copies of decrees on verbal applications. The copy of the judgment so furnished with the decree need not be on stampt paper.

The Calcutta and Bombay Sudder Courts ruled, 24th November 1859, and 3rd April 1860, that though ordinarily a copy of the judgment and the decree will be given as one document, for which, as now, one stamp will suffice, yet parties have the option of taking the two papers separately on a stamp of the requisite value for each.

Held by the Madras Sudder Court, 1st October 1860: "Any party to a suit before a District Moonsiff may obtain

certified copies of the decree and judgment, on providing the paper and regulated copyists' hire. If the value of the claim amounts to fifty rupees or more, the copy can only be granted on stampt paper, (*vide* Section 2, Schedule *B*, Act XXXVI. of 1860).

"Where a copy of a District Moonsiff's decree may by law be made on unstampt paper, any authenticated copy, granted either by the District Moonsiff or by the Civil Judge, must be made on such paper."

CHAPTER IV.

EXECUTION OF DECREES.

SECTION 199.

Decrees for immovable property.

If the decree be for land or other immovable property, the same shall be delivered over to the party to whom it shall have been adjudged.

The particular rules for delivery of possession of land or other immovable property are to be found in Sections 223 to 225.

SECTION 200.

Decrees for movable property, performance of contract, or alternative.

If the decree be for any specific movable, or for the specific performance of any contract, or for the performance of any other particular act, it shall be enforced by the seizure, if practicable, of the specific movable and the delivery thereof to the party to whom it shall have been adjudged, or by imprisonment of the party against whom the decree is made, or by attaching his property and keeping the same under attachment until further order of the Court, or by both imprisonment and attachment, if necessary; or, if alternative damages be awarded, by levying such damages in the mode hereinafter provided for the execution of a decree for money.

For instance, if particular jewels or a certain quantity of grain be decreed to the plaintiff, or the defendant be commanded to complete a house, the erection of which was contracted for by him, the Court shall deliver the jewels or grain specified to the plaintiff by seizure, if practicable, or direct the defendant to complete the building, or imprison the defendant, or attach his property, or both, until further order, or until he deliver the jewels or grain, or agree to complete his contract.

SECTION 201.

Decrees for money.

If the decree be for money, it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both, if necessary,* and if such party be other than a defendant, the decree may be enforced against him in the same manner as a decree may be enforced under the provisions of this Chapter against a defendant. When the decree is against Government or against any officer acting on behalf of Government, if the officer whose duty it is to satisfy the decree neglect or refuse to satisfy the same, the Court shall report the case through the Sudder Court for the orders of Government; and execution shall not issue on the decree, unless the same shall remain unsatisfied for the space of three months from the date of such report.

The simultaneous issue of process of arrest against the person and attachment of property, in execution of decree, may take place as before. "If such party be other than a defendant," as in the case of a set-off, where the defendant gets a decree against plaintiff for any excess beyond the claim of the latter, under Section 195, or in a case where costs are awarded against plaintiff in favor of the defendant.

In decrees against Government, or officers acting on behalf of Government, execution will issue after three months from the date of the report mentioned in this Section, unless the decree be intermediately satisfied. Where Government does not undertake the defence, as under Section 71, execution will issue against the officer sued as against a private individual.

SECTION 202.

Decrees for execution of conveyances, or endorsement of negotiable instruments.

If the decree be for the execution of a conveyance or for the endorsement of a negotiable instrument, and the party ordered to execute or endorse such conveyance or negotiable instrument shall neglect or refuse so to do, any party, interested in having the same executed or endorsed, may prepare a conveyance or endorsement of the instrument in accordance with the terms of the decree, and tender the same to the Court

* The expression "if necessary" implies that the simultaneous issue of process of arrest and attachment of property is not to take place as a general rule, but only when the Court sees fit for special reasons. This is implied also by the concluding words of Section 212, "the arrest and imprisonment of the person named *or* attachment of his property." See also Section 282.

By the English law, but one kind of writ can issue at a time, a proper rule in favor of the liberty of the subject, by compelling resort to personal and other property in the first instance.

If *lands* be seized in execution, "after it the body of the defendant cannot be taken." Arrest may, however, take place, "if execution can only be had of the goods because there are no lands, and such goods are not sufficient to pay the debt." A creditor may obtain an order for charging public securities, or the shares of any public company, with the payment of the amount decreed; but if he, after obtaining such charge, or any other charge or security, take the person of the debtor in execution, he shall be deemed to have relinquished his charge or security.

for execution upon the proper stamp (if any is required by law), and the signature thereof by the judge shall have the same effect as the execution or endorsement thereof by the party ordered to execute.

This is a very useful provision. There was no similar provision in the former procedure of the Courts, which were helpless if the defendant refused to sign a conveyance in terms of the decree. The procedure laid down here is similar to what was followed in the Supreme Court, where the master signed for the recusant defendant.

SECTION 203.

Decrees against representatives of deceased persons.

If the decree be against a party as the representative of a deceased person, and such decree be for money to be paid out of the property of the deceased person, it may be executed by the attachment and sale of any such property, or, if no such property can be found, and the defendant fail to satisfy the Court that he has duly applied such property of the deceased as shall be proved to have come into his possession, the decree may be executed against the defendant to the extent of the property not duly applied by him, in the same manner as if the decree had been against the defendant personally.

This is a provision unknown to the former law in decrees against the estates of deceased persons. As a general rule, decrees against the estate of the deceased cannot be executed personally against his representative. This Section enables the Court to inquire how the property of the deceased has been appropriated by his representative, and, on the failure of the latter to account for it, the decree may be executed against him personally.

SECTION 204.

Decrees against sureties.

Whenever a person has become liable as security for the performance of a decree or of any part thereof, the decree may be executed against such person to the extent to which he has rendered himself liable, in the same manner as a decree may be enforced against a defendant.

For instance, where a party stands bail for the defendant under Section 76, or security for the performance of the decree under Section 83.

SECTION 205.

What property liable to attachment and sale in execution of a decree.

The following property is liable to attachment and sale in execution of a decree, namely, lands, houses, goods, money, bank-notes, cheques, bills of exchange, promissory notes, Government securities, bonds, or other securities for money, debts, shares in the capital or joint-stock of any Railway, Banking, or other Public Company or Corporation, and all other property whatsoever, movable or immovable, belonging to the defendant, and whether the same be held in his own name or by another person in trust for him or on his behalf.

The meaning of the Section is, that all property of a debtor in his own name or benamee, which is in his possession, or in which he has a vested right, is salable in satisfaction of a decree against him, but not any property in which he has a contingent interest, or an interest to accrue on the occurrence of a particular event. For example, debts, which may be enforced by suit, or lands, the subject matter of a suit instituted by the debtor, are salable. But the interest of a son in his father's or of a daughter's son in his grandfather's estate cannot be sold in execution of decree. See rulings under Section 237.

SECTION 206.

Payment of the monies under decrees, &c.

Adjustment of decree to be made through the Court.

All monies payable under a decree shall be paid into the Court whose duty it is to execute the decree, unless such Court or the Court which passed the decree shall otherwise direct. No adjustment of a decree in part or in whole shall be recognised by the Court, unless such adjustment be made through the Court, or be certified to the Court by the person in whose favor the decree has been made, or to whom it has been transferred.

The provisions of this Section are intended to stop at once the false pleas of payment, which used to be constantly set up by debtors, to evade the effects of decrees, and in some instances by the decree-holders, to avoid the operation of the law of limitation.

Application for Execution.

SECTION 207.

Application for execution how to be made.

When any party in whose favor a decree has been made is desirous of enforcing the same, he shall apply to the Court whose duty it is to execute the decree, either in person or through his pleader in the suit, or some other pleader duly appointed to act for him in that behalf. If there be two or more decree-holders, one or more of them may make the application, if the Court shall see sufficient cause for allowing him or them to make such application; and the Court shall, in such case, pass such order as it may deem necessary for protecting the interests of the other decree-holders.

"Whose duty it is to execute the decree." Generally the Court that passes the decree, or, where there has been an appeal, the Court which passed the original decree, is the Court that executes it. Where the decree cannot be executed within the Court's jurisdiction, it may be sent for execution to some Court capable of executing it, under Section 284.

"In person," including his recognised agent. "Through his pleader in the suit, or some other person." In the latter case, a vakalutnamah will be necessary, but a new one will not be required in the former case. The last part of this Section is properly inserted to prevent failure of justice, which often occurred under the former practice, under which, when there were two or more joint decree-holders, all had to join before the decree could be put in execution. The holder of even a small share in the decree might, either from collusion or other cause, render it entirely abortive by refusing to join in the execution. This Section provides for such a contingency, and gives a discretion to the Court, on the application of any one or more of the decree-holders, to order execution, making proper provision for the security of the absent parties. For instance, in a joint decree held by four brothers, where it is patent that each of them is entitled to a fourth of the property or amount decreed, the Court may allow execution in regard to one-fourth only, or in regard to the whole, taking care to keep under its management, or in deposit, the shares of the other brothers.

SECTION 208.

Application by whom to be made, if decree be transferred from original decree-holder to another person.

If a decree shall be transferred by assignment or by operation of law from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall have been so transferred, or his pleader; and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder.

Held by the Madras Sudder Court, 17th May 1861: "If a decree-holder die, the decree is transferred by operation of law to his legal representative; but it cannot be executed in favor of such representative, until he has obtained a certificate from the District Court, under Act XXVII. of 1860."

SECTION 209.

Cross-decrees.

If there be cross-decrees between the same parties for the payment of money, execution shall be taken out by that party only who shall have obtained a decree for the larger sum, and for so much only as shall remain after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum, as well as satisfaction on the decree for the smaller sum, and if both sums shall be equal, satisfaction shall be entered upon both decrees.

The above rules shall apply to decrees sent to a Court for execution as well as to decrees in the same Court.

Whenever a suit shall be pending in any Court against the holder of a decree of such Court by the person or persons against whom the decree was

passed, the Court may, if it appear just and reasonable to do so, stay execution on the decree either absolutely, or on such terms as it may think just, until a decree shall be passed in the pending suit.

This Section provides for those cases where a set-off could not be, or had not been pleaded or allowed. If they be decrees of two different Courts, the holder of the decree for the larger amount may take out execution in the Court which passed it, and file a copy of that against him for the smaller amount, with a view to satisfaction being entered for it. The Court executing the decree for the larger amount will, it is to be presumed, send notice of its proceedings to the other Court.

Where *A* holds a decree against *B*, *C*, and *D*, for a small sum, and *B* alone holds a cross-decree against *A* for a larger sum, the case will come within this Section. *B* will be entitled to take out execution for the excess only.

A has a suit pending in the Hooghly Court against *B*, who holds a decree of the same Court against *A*, and has taken out execution thereof; the Court may, in its discretion, looking into the merits of that suit, stay execution of *B's* decree absolutely.

"It may stay execution on such terms as it may think just;" for instance, if the suit appear a doubtful one, the Court may order security to be taken from *A* before staying execution.

SECTION 210.

If any person against whom a decree has been made shall die before execution has been fully had thereon, application for execution thereof may be made against the legal representative, or the estate of the person so dying as aforesaid; and, if the Court shall think proper to grant such application, the decree may be executed accordingly.

If the person against whom a decree is made shall die before execution, application may be made against his legal representative or estate.

The application shall not be granted without notice to the representatives under Section 216. When execution is sought against the estate of a deceased person, his legal representatives must be brought in, and notice served upon them.

SECTION 211.

If the decree be ordered to be executed against the legal representative, it shall be executed in the manner provided in Section 203, for the execution of a decree for money to be paid out of the property of a deceased person.

Decree how to be executed against legal representative.

SECTION 212

Form and contents of application for execution of decree.

The application for execution of a decree shall be in writing, and shall contain in a tabular form the following particulars, namely, the number of the suit; the names of the parties; the date of the decree; whether any appeal has been preferred from the decree; and whether any and what adjustment of the matter in dispute has been made between the parties subsequently to the decree; the amount of the debt or damages due upon it, or other relief granted by the decree; the amount of costs, if any were awarded; the name of the person against whom the enforcement of the decree is sought; and the mode in which the assistance of the Court is required, whether by the delivery of property specifically decreed, the arrest and imprisonment of the person named, or attachment of his property, or otherwise, as the case may be.*

SECTION 212 *a*.

[Section 13, Act XXIII. of 1861.]

In suits of the nature and amount cognizable by Small Cause Courts, Court may on verbal application of the judgment-creditor direct immediate execution either against the person or property of judgment-debtor.

When a decree is passed in any suit of the nature and amount cognizable by Courts of Small Causes constituted under Act XLII of 1860, the Court passing the decree, whether such Court be a Court constituted as aforesaid, or any other Court, may, at the same time that it passes the decree, on the verbal application of the party in whose favor the decree is given, direct immediate execution thereof, by the issue of a warrant directed either against the person of the judgment-debtor, if he is within the local limits of the jurisdiction of the Court passing the decree, or against the personal property of the judgment-debtor within the same limits. If the warrant be directed against the personal property of the judgment-debtor, it may be general against any personal property of the judgment-debtor, wherever it may be found within the local limits of the jurisdiction of the Court, or special against any personal property belonging to the judgment-debtor within the same limits, which shall be indicated by the judgment-creditor.

This rule, originally passed for the Mofussil Small Cause Courts, has been extended and made applicable, by the above Section, to such decrees of other Courts, in suits not exceeding in amount or value five hundred rupees, and being of the descriptions cognizable by those Small Cause Courts. (Vide remarks under Section 1.) In those places where Small Cause Courts have not been established, this rule will doubtless facilitate the execution of decrees of the descriptions enumerated. It is a point for consideration

* In every Court a time is allowed to intervene between the judgment and execution. In the Small Cause Court in Calcutta it is four days. The time is given both to enable the party cast to apply for a new trial, and to pay the money into Court, if he think further proceedings inexpedient.

whether, since distinctions such as these *are* made in the decrees of the ordinary Courts, the object in view, speedy execution, would not have been better provided by referring simply to the amount or value decreed, and not to the special features of each.*

SECTION 213.

Further particulars when the application is for an attachment of immovable property.

When the application is for an attachment of any land or other immovable property belonging to the defendant, it shall be accompanied with an inventory or list of such property, containing such a description of the property as may be sufficient to identify it, together with a specification of the defendant's share or interest therein, to the best of the applicant's belief, and so far as he has been able to ascertain the same. And where the property is an estate paying revenue to Government, or any portion of such estate, the application for an attachment shall be accompanied with an authenticated extract from the register of the Collector's office, specifying the revenue of such estate and the names and (where registered) the shares of the registered proprietors.

Held by the Madras Sudder Court, 15th December 1860: "It is an authenticated extract from the register, as it exists, which is alone required; and it is not competent to the revenue authorities to refuse to grant the same, notwithstanding that such register may not indicate the present owner of the land."

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* No *inquiry* is ordered as to the debtor's possessing the means of paying. Should such prove to be the case, it is obvious that the process should issue against the property and not the person of the debtor. According to Burke: "Every idea of judicial order is subverted by this proceeding. If the insolvency be no crime, why is it punished with *arbitrary* imprisonment? If it be a crime, why is it delivered into private hands to *pardon without discretion* or to *punish without mercy* and without measure." See the note on Section 278.

Imprisonment is employed as an agent of coercion upon two grounds, which Burke has shown to be capital mistakes. The *presumption of solvency* is manifestly false in the majority of cases, and should therefore be the subject of *inquiry* in every instance. The expectation of the debtor's obtaining *relief from friends*, must fail in many cases even with regard to persons of respectable connections, and in all cases where the debtors are of the lower orders. This ground, however, is an immoral one, and should be discountenanced by the law.

If the *punishment* of the debtor be the object of imprisonment, it should neither be left to the discretion of the creditor, nor inflicted without actual proof of criminality on the part of the debtor.

When sympathy is claimed for creditors, it should not be forgotten that there is no obligation to give credit without security. "It seldom happens (observes Dr. Johnson) that any man imprisons another but for debts which he suffered to be contracted, in hope of advantage for himself, and for bargains in which he proportioned his profit to his own opinion of the hazard."

Section 273 allows a person, who has been arrested, to apply for such inquiry, but at a most inconvenient time. See the notes to that and the following Section.

SECTION 214.

Where the application is for an attachment of the defendant's movable property, or any part thereof, it may be accompanied with an inventory or list of the property to be attached, containing a reasonably accurate description thereof; or the applicant may apply for a general attachment of the defendant's movable property wheresoever the same can be found, to the amount of the judgment and costs.

The application for an attachment of movable property may be general, or may be accompanied with an inventory of the property to be attached.

Where a particular attachment is ordered, it is expected that, to prevent its being used as a means of annoyance to others, the application shall be accompanied with an inventory of the defendant's movable property. The application for a general attachment of the defendant's *movable* property is a new provision, which often becomes necessary from the decree-holder's want of knowledge of his judgment-debtor's property.

SECTION 215.

[Repealed by Section 1, Act XXIII. 1861, and re-enacted by Section 15, as follows.]

The Court, on receiving any application for execution of a decree, containing the particulars mentioned in Section 212 of Act VIII. of 1859, or such of them as may be applicable to the case, shall enter a note of the application and the date on which it was made in the register of the suit. If it shall be shown to the Court that the particulars do not correspond with the original decree, the Court shall either return the application for correction to the person making it, or shall, with the consent of such person, cause the necessary correction to be made. If the application be admitted, the Court shall order execution of the decree according to the nature of the application.

Procedure on receiving application for execution of decree.

The alterations made in this Section were owing, as stated in the second edition of this work, to the difficulty experienced in comparing the applications, in every case, with the original decrees. It is left to parties interested to bring to the Court's notice the inaccuracies in the applications for execution of decrees.

Held by the Madras Sudder Court, 1st October 1860: "All decrees, whether passed before or after the Act came into operation, must be executed under the provisions of this Act."

Measures required in certain cases preliminary to the Issue of the Warrant.

SECTION 216.

In certain special cases, notice to show cause why the decree should not be executed shall be issued.

If an interval of more than one year shall have elapsed between the date of the decree and the application for its execution, or if the enforcement of the decree be applied for against the heir or representative of an original party to the suit, the Court shall issue a notice to the party against whom execution may be applied for, requiring him to show cause, within a limited period to be fixed by the Court, why the decree should not be executed against him. Provided that no such notice shall be necessary, in consequence of an interval of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of the last order passed on any previous application for execution; and provided, further, that no such notice shall be necessary, in consequence of the application being against an heir or representative, if, upon a previous application for execution against the same person, the Court shall have ordered execution to issue against him.

Proviso.

"Limited period," that is, such time as will admit of the party's receiving notice, and coming forward with his objections, if he have any. The Court should be satisfied, before granting an application for execution under this Section, that the notice has been regularly served. The notice is to be served in the same manner as a summons to a defendant under Section 47. If an application for execution be made on the 1st January 1859, and granted, and afterwards struck off on the 1st December 1859, and a fresh application be made on the 1st May 1860, in such case a notice is not necessary under this Section. This provision is similar to that prescribed by Section 7, Regulation VII. of 1825, of the Bengal Code, and to the practice which prevailed.*

"51. The following shall be the form of the notice which the Court is to issue under Section 216.

Court of the ————.

No. —— of ————.

———————————— Decree-holder.

———————————— Judgment-debtor.

To ———, inhabitant of ———. Take notice that an application has this day been made by ———, inhabitant of ———, for enforcement of the decree passed against you on

* The practice was perhaps proper under the former system, but is inconsistent with the provision in Section 206 for the payment into Court of all sums paid in execution.

the ———, in the suit noted in the margin, and that you are required to appear on or before the ———, and show cause why execution of the said decree should not issue against you, failing which, an order for execution will forthwith issue in terms of the application.

Given under my hand and the seal of this Court.

Seal of Court. *Principal Sudder Ameen.*"

—*S. C. Cir. Or., 29th July* 1859.]

SECTION 217.

Procedure after issue of notice.

When such notice is issued, if the party shall not attend in person or by a pleader, or shall not show sufficient cause to the satisfaction of the Court why the decree should not be forthwith executed, the Court shall order it to be executed accordingly. If the party shall attend in person or by a pleader, and shall offer any objection to the enforcement of the decree, the Court shall pass such order as in the circumstances of the case may appear to be just and proper.

It is not to be understood that, if a party does not come within the time allowed, but comes before execution is ordered, the Court is thereby debarred from hearing his objections. Orders under this Section are not appealable.

SECTION 218.

Application for a general attachment of movable property.

Where the application is for a general attachment of the movable property of the defendant, it shall be competent to the Court, if it shall think proper, before issuing an order for such attachment, to require the applicant to give security to the satisfaction of the Court, in such sum as may be considered adequate, for any injury that may be occasioned by the attachment of property belonging to any other person than the defendant.

The provision for demanding security, before granting an application for general attachment, is necessary to prevent evil-disposed men from annoying and harassing persons unconnected with the judgment-debtors, by attaching the property of such persons under color of a general attachment. The Courts should be very cautious in granting such applications.

SECTION 219.

Before granting order, Court may make certain inquiries as to the property to be attached.

Before granting the order for a general attachment, or at the instance of the plaintiff at any time after judgment and before complete execution of the decree, the Court may summon the person against whom the application is made, and examine him as to the property liable to be seized in satisfaction of the judgment. The Court may also, of its own motion, or at the instance of any person

interested in the inquiry, summon any other person whom it may think necessary, and examine him in respect to such property, and may require the person summoned to produce all deeds and documents in his possession or power relating to such property.

This is a new provision, empowering the Civil Courts to examine the debtor, as well as other persons capable of giving information, regarding his property, *before granting general attachment;* but, at the instance of the decree-holder, they may examine the defendant at any time between the decree and the execution thereof.

SECTION 220.

Rules applicable to the summoning and examination of parties and witnesses after judgment.

In all cases in which a summons may be issued for the attendance of a party to a suit or any other person at any time after judgment, the rules, applicable to the summoning and examination of parties and witnesses after issues recorded, shall apply to the party or witnesses so summoned.

The rules referred to are those in Section 149 and the following Sections.

Issue of the Warrant.

SECTION 221.

Warrant when to issue.

When all necessary preliminary measures have been taken, where any such are required, the Court, unless it see cause to the contrary, shall issue the proper warrants for the execution of the decree.

"Preliminary measures;" those mentioned in Sections 216—219, according to the circumstances of each case.

Held by the Madras Sudder Court, 1st October 1860: "If the person, against whom it is sought to execute the decree, plead that he never was defendant in the suit, or that, though called by the same name, he is not the individual referred to in the plaint and judgment, the Court must inquire into the plea, after notice to the decree-holder, and pass such order as may appear just and proper. If the plea be substantiated, the judgment cannot of course be enforced against him. The order passed will, under Section 364, not be subject to appeal."

SECTION 222.

Latest day of execution to be written in warrant, and time and manner of execution to be endorsed.

Every warrant for the execution of a decree shall bear the date of the day on which it is issued, and shall be signed by the judge and sealed with the seal of the Court, and delivered to the nazir or other proper officer of the Court. A day shall be specified in the warrant on or before which it must be executed, and the nazir or other proper officer shall endorse upon the warrant the day

and the manner in which it was executed, or, if it was not executed, the reason why it was not executed, and shall return it with such endorsement to the Court from which it issued.

The warrant is to be, according to the nature of the application, against the person or property of the judgment-debtor. The procedure, which is to follow the issue of warrant, is laid down in the following several heads of execution of decrees :—Of the execution of decrees for immovable property. Of the execution of decrees for money by attachment of property. Of claims to attached property. Of sales in execution of decrees. Of arrest in execution of decrees for money. Of the execution of decrees by imprisonment. Of execution of a decree out of the jurisdiction of the Court by which it is passed.*

Of the Execution of Decrees for Immovable Property.

SECTION 223.

How immovable property is to be delivered when in the occupancy of a defendant, or of some person under him.

If the decree be for a house, land, or other immovable property in the occupancy of a defendant, or some person on his behalf, or of some person claiming under a title created by the defendant subsequently to the institution of the suit, the Court shall order delivery thereof to be made by putting the party to whom the house, land, or other immovable property may have been adjudged, or any person whom he may appoint to receive delivery on his behalf, in possession thereof, and, if need be, by removing any person who may refuse to vacate the same.

Alienations of immovable property, *pendente lite*, are void by this Section. It also empowers the Court to remove any of the persons mentioned in it from the property, if they refuse to vacate the same. The Section refers to immovable property in the occupancy of the defendant, or some other persons claiming in trust for him, or under a title created subsequent to the institution of the suit for that property.

The Calcutta Sudder Court ruled, 24th December 1859, that though this Section recognises the doctrine of *lis pendens*,

* The mention of a time on the expiry of which the writ will require to be renewed, is of questionable utility. If the existence of property belonging to the debtor be known, let it be at once attached, and, whether sufficient or insufficient to satisfy the decree, let the debtor obtain an acquaintance. If there be grounds for *believing* that property has been concealed, let the debtor be imprisoned for a certain period, and afterwards discharged from all liability for the debt. By the English law a judgment must be revived every six years, to allow of execution issuing upon it. But the principle of even that rule is inconsistent with the insolvent law, by which judgments are rendered inoperative on the debtor's assigning his property, if he have any, for the benefit of his creditors.

i. e. that subsequently to the institution of a suit, neither party can alienate the property in dispute, so as to affect his opponent, the Code, nevertheless, with a view of preventing illegal acts of *vexatious alienation*, by Section 92 empowers the Court to issue an injunction commanding the parties to refrain from such acts.

SECTION 224.

How it is to be delivered when in the occupancy of ryots.

If the decree be for land or other immovable property in the occupancy of ryots or other persons entitled to occupy the same, the Court shall order delivery thereof to be made by affixing a copy of the warrant in some conspicuous place on the land or other immovable property, and proclaiming to the occupants of the property, by beat of drum, or in such other mode as may be customary, at some convenient place or places, the substance of the decree in regard to the property.

This Section refers to the mode of delivery of property which is not in the *actual* possession of the defendant, but in the occupancy of ryots, talookdars, farmers, &c., who are entitled to remain in possession.

SECTION 225.

Division of estate or separation of share how to be made.

If the decree be for the division of an estate or for the separate possession of a share of an undivided estate paying revenue to Government, the division of the estate or the separation of the share shall be made by the Collector, under the orders of the Court, according to the rules in force for the partition of an estate paying revenue to Government.

The rule is similar to that which existed under the former practice.

Held by the Madras Sudder Court, 9th April 1861: "Salt pans do not come under the designation of estates paying revenue to Government; and decrees for the separate possession of shares of salt pans should therefore be executed by the Courts and not by the Collector of the district."

SECTION 226.

Obstruction to execution of decree for immovable property.

If, in the execution of a decree for land or other immovable property, the officer executing the same shall be resisted or obstructed by any person, the person in whose favor such decree was made may apply to the Court at any time within one month from the time of such resistance or obstruction. The Court shall fix a day for investigating the complaint, and shall summon the party against whom the complaint is made to answer the same.

It will be seen, by carefully comparing the new rules regarding execution of decrees with those previously in force, that great improvements have been introduced in the former. These are principally the following.

1. As has been already observed, the power given to apply for a general attachment.

2. The rules regarding the investigation of claims to property attached, or in course of being taken possession of by decree-holders, have undergone thorough revision. Where claims are preferred by third parties to property, which has been adjudged to the plaintiff, on the ground that such property does not belong to the defendant, or was not in his possession, or that of any party to the suit, such claims are converted into regular cases between the decree-holder and the claimant, and adjudicated upon as regular suits, following the usual course of appeal. By this means much loss of time and litigation regarding the contested property will be avoided. Under the former practice such claims would form the subject primarily of a summary investigation, which was carried through three stages by appeal to the Sudder. The losing party then had the choice of getting the point again tried by a regular suit, which had also to go through three stages. Thus there was more delay than the ends of justice actually required. By this Code the six stages are reduced to three, and the summary investigation is entirely left out, as unnecessary. So again, when property is attached for sale in execution of decree for money, one summary inquiry is prescribed without appeal; but the losing party is entitled to bring a regular suit to establish his right within one year, instead of twelve years, as was the case formerly. By this process two stages of summary appeal have been avoided.

3. It was a stigma on the former practice of the Civil Courts that a purchaser at a sale in execution of decree generally purchased a lawsuit. He could not obtain possession of his purchase except by a regular suit, with its attendant appeals, at great cost and sacrifice of time. This Code remedies that evil. The Civil Courts will now give and enforce possession. In case of *bonâ fide* claimants coming forward, their objections to such possession will be inquired into summarily without appeal, and possession will be given or withheld accordingly. The losing party in such summary inquiry is entitled to bring

a regular suit to establish his right within one year, and not twelve years, as formerly.

4. Another defect in the former practice was, that it allowed even a defendant to claim to set aside a sale on grounds of irregularity, whether productive of injury to him or not, by a regular suit within the long period of twelve years from the date thereof, and that, too, after having unsuccessfully fought for the same object during the three stages of a summary inquiry. This Code allows such objections to be preferred only within thirty days after sale. The order setting aside the sale on such objections is final, and not subject to appeal. If the sale be confirmed notwithstanding the objections, but one summary appeal is allowed, without the privilege of a regular suit afterwards.

5. This Code limits the grounds on which a sale may be set aside, that is, such irregularities as have produced substantial injury to the applicant. The length of time allowed under the former law to contest a sale was bad enough; but the evil was enhanced by the facility with which a sale could be set aside, by showing any deviation from the strict letter of the law on matters of procedure, whether such deviation caused any material damage to the defendant or not. It is very judiciously prescribed in this Code, that no sale shall be set aside on the ground of irregularity, unless the applicant can show, to the satisfaction of the Court, that he has sustained substantial injury by reason thereof.

6. This Code gives a just preference to the attaching judgment creditor in the distribution of the proceeds of sale. Under the former practice the laborious and diligent decree-holder was not unfrequently placed on a level with the lazy and sleeping man. The former took all the trouble, incurred all the expense, suffered all the inconvenience, and ran all the risk of an uncertain litigation in ferreting out concealed property. When he succeeded at last, he had the grievous mortification to see the fruit of his labors snatched from his grasp, and so divided as, in many cases, to leave only the husks for himself. This Code provides that the first attaching decree-holder will have his decree first satisfied, and that the balance will be ratably divided among other decree-holders, who have taken out execution before the order of distribution.

7. Under this Code a person may be appointed for

the management of the debtor's land, or other immovable property, and for recovery of debts due to him, with the view of satisfying the decree from such proceeds; or to allow time on the application of the debtor, or collector, to enable the former to raise money on mortgage or other temporary alienation of his property for such purpose, whenever the Court shall consider such proceedings conducive to the interest of all parties concerned.

8. This Code introduces a wholesome measure for the relief of honest debtors, who have no present means or prospect of paying their debts. On a disclosure of their circumstances, they are exempted from the indignity and hardship of imprisonment.

There are other improvements, which will strike the reader as he goes through these Sections to the end of the chapter.

The summons to the party complained against will be issued in the same manner as the summons to the defendant before trial. Application must be made within one month from the time of resistance. That time can be ascertained from the return of the executing officer.

SECTION 227.

Obstruction by defendant.

If it shall appear to the satisfaction of the Court that the obstruction or resistance was occasioned by the defendant, or by some person at his instigation, on the ground that the land or other immovable property is not included in the decree, or on any other ground, the Court shall inquire into the matter of the complaint, and pass such order as may be proper under the circumstances of the case.

SECTION 228.

How defendant may be dealt with, if he persist in obstructing the complainant.

If the Court shall be satisfied, after such investigation of the facts of the case as it may deem proper, that the resistance or obstruction complained of was without any just cause, and that the complainant is still resisted or obstructed in obtaining effectual possession of the property adjudged to him by the decree, by the defendant or some person at his instigation, the Court may, at the instance of the plaintiff, and without prejudice to any proceedings to which such defendant or other person may be liable under any law, for the time being in force, for the punishment of such resistance or obstruction, commit the defendant or such other person to close custody for such period, not exceeding thirty days, as may be necessary to prevent the continuance of such obstruction or resistance.

If the resistance be offered by the defendant, or at his instigation, the Court may order the defendant to vacate or

desist from resistance. If he persist, he may be committed to custody for thirty days to enforce compliance.

"Without prejudice to any proceedings, &c." By the Penal Code resistance to the lawful process of a Court is an offence punishable by the Criminal Courts. Besides the month's imprisonment, the defendant or other person resisting may be prosecuted under that Code. There is an appeal from orders under this Section (*vide* Section 365).

"52. Resistance of process in cases of attachment or seizure of movable property is still punishable under Section 25, Regulation IV. of 1793, of the Bengal Code, which has not been repealed. No provision has been made in the Code for the punishment of resistance in these cases."—*S. C. Cir. Or.*, 29*th July* 1859.

SECTION 229.

Obstruction by a *bonâ fide* claimant other than the defendant.

If it shall appear to the satisfaction of the Court that the resistance or obstruction to the execution of the decree has been occasioned by any person, other than the defendant, claiming *bonâ fide* to be in possession of the property on his own account, or on account of some other person than the defendant, the claim shall be numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant, and the Court shall, without prejudice to any proceedings to which the claimant may be liable under any law, for the time being in force, for the punishment of such resistance or obstruction, proceed to investigate the claim, in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant, under the provisions of this Act, and shall pass such order for staying execution of the decree, or executing the same, as it may deem proper in the circumstances of the case.

This Section refers to the resistance of persons, not being the defendants, who have *bonâ fide* claims to property attempted to be taken possession of in execution of a decree.

"Shall pass such order," &c. The Court, on the *primâ facie* merits of the case between the decree-holder and claimant, may stay execution of the decree or otherwise, as it may deem proper. There is no appeal against such order. No stamp fee is to be levied in such suits, on the principle that the claimant does not come to seek the assistance of the Court of his own accord, but is compelled to appear in Court to protect his own property against the invasion of the decree-holder. This Section applies to a case in which the decree-holder has met with resistance, and failed to execute the decree. When he has been put into possession, notwithstanding the resistance and objec-

tion of other parties, that case is provided for in the following Section.

The claims of putneedars and others, alleging the lands, adjudged by the decree, to be their putnee or other tenure, and resisting the right of the decree-holder to actual possession, may be investigated under the provisions of this Section.

Held by the Madras Sudder Court, 1st October 1860: "The claim of the decree-holder is not required to be written upon the stamp required for a plaint." The Agra Sudder Court have ruled that such applications should be written on the stampt paper required for miscellaneous cases.

The Bombay Sudder Court held, 2nd October 1860, that "the application (under this and the following Section) should be on stampt paper of a value proportioned to the amount of the attachment, or to the value of the property, whichever may be less, as has hitherto been the practice in suits to raise attachments."

The Calcutta Sudder Court ruled, 18th July 1860, that appeals under Section 231, from decisions passed under this and the following Section, must be upon full stamps.*

SECTION 230.

Procedure in certain cases, if person dispossessed of immovable property dispute the right of decree-holder to be put into possession of such property.

If any person other than the defendant shall be dispossessed of any land or other immovable property in execution of a decree, and such person shall dispute the right of the decree-holder to dispossess him of such property under the decree, on the ground that the property was *bonâ fide* in his possession on his own account, or on account of some other person than the defendant, and that it was not included in the decree, or, if included in the decree, that he was not a party to the suit in which the decree was passed, he may apply to the Court within one month from the date of such dispossession; and if, after examining the applicant, it shall appear to the Court that there is probable cause for making the application, the application shall be numbered and registered as a suit between the applicant as plaintiff and the decree-holder as defendant, and the Court shall proceed to investigate the matter in dispute, in the same manner and with the like powers as if a suit for the property had been instituted by the applicant against the decree-holder.

* The obstruction referred to in Sections 226—228 is supposed to proceed from the party cast, and is, on the application of the decree-holder, to be disposed of summarily. That which is provided for in Sections 229—231 is, on a preliminary inquiry, presumed to be *bonâ fide*. The Court is, therefore, *required* to treat it in every way as a regular suit, *making* the decree-holder and the claimant of the property plaintiff and defendant respectively. Hence no *claim* or *application* in writing, such as the Madras, Agra, and Bombay Sudder Courts have supposed, need be put in. Again, the party against whom the decision in such *feigned suit* is given, being interdicted, by Section 231, from instituting, as heretofore, a regular suit, there is as much reason for dispensing with a stamp for the appeal (however anomalous it may seem) as for the suit from which it arises.

The application of a claimant who has been dispossessed in execution of decree will be entertained, if preferred within one month after dispossession. The date of dispossession can be ascertained from the return of the executing officer. As claims under this Section are preferred after the decree-holder obtains possession, the Court, before acting on the application of the claimant, must be satisfied that he has a *primâ facie* cause of complaint. The method taken in this case is very properly unlike that of the preceding Section. The claimant will be ranked as plaintiff and the decree-holder as defendant. The Courts should be careful that they are not imposed upon by false returns of the executing officer, of possession being given to the decree-holder, so often filed in Courts by collusion.

"After examining the applicant," includes his pleader, recognised agent, or any other person in his behalf, capable of furnishing the Court with the necessary information, as in Section 125.

Held by the Madras Sudder Court, 1st October 1860: "The application need not be written on the stamp required for a plaint."

SECTION 231.

Appeals from decisions under the last two Sections.

The decision passed by the Court under either of the last two Sections shall be of the same force as a decree in an ordinary suit, and shall be subject to appeal under the rules applicable to appeals from decrees; and no fresh suit shall be entertained in any Court between the same party or parties claiming under them in respect of the same cause of action.

Of the Execution of Decrees for Money by Attachment of Property.

SECTION 232.

Attachment of property in execution of decree for money.

If the decree be for money, and the amount thereof is to be levied from the property of the person against whom the same may have been pronounced, the Court shall cause the property to be attached in the manner following.

SECTION 233.

Attachment by seizure of movable property in possession of defendant.

Where the property shall consist of goods, chattels, or other movable property in the possession of the defendant, the attachment shall be made by actual seizure, and the nazir or other officer shall keep the same in his own custody, or in the custody of his subordinates, and shall be responsible for the due custody thereof.

Under this Section the property attached is to be in the custody of the nazir. This arrangement avoids the inconvenience which was felt when it used to be placed in charge of the head man of the village, or any other persons on the spot.

A question was put to the Calcutta Sudder Court, as to the course to be followed in cases of resistance to the attachment of movable property. The Court observed (12th August 1859) that Section 25, Regulation IV. of 1793, of the Bengal Code, was still in force, and, moreover, that when the nazir apprehends resistance, he should call upon the police to prevent any breach of the peace. It may be added that, besides the extensive powers given by this Code, and the rules from Sections 22 to 25 of the Regulation above cited, which have not been repealed, resistance of process, as already observed, is made a criminal offence by the Penal Code.

Held by the Madras Sudder Court, 1st October 1860: "Movable property found in the defendant's possession and attached by actual seizure, cannot be left in the charge of a surety. But where such property may be at a distance from the Court and of a description difficult to remove, the ameen deputed to attach it may keep the same in his custody upon the spot; and, on the receipt of his report, the Court may at once proceed, under Section 242, to order the sale of the property so attached."

Held by the Madras Sudder Court, 15th December 1860:

"The ameen should be directed to remain in charge of movable property, attached in execution under this Section, only where it may be of a nature difficult to remove, or at a great distance from the Court; and in all such cases measures should be taken to effect the sale of the property, immediately after the expiration of the fifteen days' notice required by the Act.—Where movable property has to be attached in execution, and it is of a perishable nature, the usual process for attachment and sale should be issued simultaneously under Section 250 of the Act.

"In attaching movable property *before judgment*, the ameen should be required to bring the property to Court and deliver it into the custody of the nazir or head gomashta, unless it be of a perishable nature, in which case it may be sold under Section 250, as in execution, and the proceeds kept in deposit."

SECTION 234.

Attachment by prohibitory order of movable property, to which defendant is entitled, subject to a lien.

Where the property shall consist of goods, chattels, or other movable property, to which the defendant is entitled, subject to a lien or right of some other person to the immediate possession thereof, the attachment shall be made by a written order, prohibiting the person in possession from giving over the property to the defendant.

For instance, *A*, the defendant, has pledged a watch with *B*, on the loan of a sum of money, the decree-holder against *A* may attach the watch in the hands of *B* as the property of *A*, subject to the lien of *B*.

"53. The prohibitory orders in Sections 234, 235, and 236 may have the same heading as the notice in para. 51. The body of the order, however, will run thus.

"Whereas the decree-holder in the case above-mentioned has applied for attachment of the following property, *viz.* ————, and it appears that the aforesaid property is at present in your possession; take notice, therefore, that you are hereby prohibited from (here give the prohibition in terms as nearly as possible of the Sections referred to, describing with precision the property referred to).

Given under my hand and the seal of this Court.

Seal of Court. *Principal Sudder Ameen.*

"A slight variation will adapt these forms to the notices of attachment authorised in Section 237."—*S. C. Cir. Or., 29th July* 1859.

The Bombay Sudder Court observed, 2nd October 1860, that Chap. XI. Regulation IV. of 1827, of the Bombay Code, provides for the punishment of non-compliance with prohibitory orders for attachment of movable or immovable property.

SECTION 235.

Attachment by prohibitory order of immovable property.

Where the property shall consist of lands, houses, or other immovable property, the attachment shall be made by a written order, prohibiting the defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise.

The written order is to be served as prescribed in Section 239.

Held by the Madras Sudder Court, 15th December 1860: "In attaching immovable property, the ameen is never to remain in charge, but to return to the Court as soon as he has proclaimed the written order."

SECTION 236.

Attachment by prohibitory order of debts not being negotiable instruments, and of shares in public companies, &c.

Where the property shall consist of debts not being negotiable instruments, or of shares in any railway, banking, or other public company or corporation, the attachment shall be made by a written order, prohibiting the creditor from receiving the debts, and the debtor from making payment thereof to any person whomsoever, until the further order of the Court, or prohibiting the person in whose name the shares may be standing from making any transfer of the shares or receiving payment of any dividends thereof, and the manager, secretary, or other proper officer of the company or corporation from permitting any such transfer or making any such payment, until such further order.

For instance, *B* is indebted to *A*, the defendant, for value of goods sold and delivered by the latter, or for some work done, or for advances made for the former: these debts may be attached by a written order to *A* not to receive these sums, and to *B* not to pay them to any one, until the further order of the Court.

SECTION 237.

Attachment by notice of money or securities in deposit in a Court of justice, or with a Government officer.

Where the property shall consist of money, or of any security in deposit in any Court of justice, or in the hands of any officer of Government, which is or may become payable to the defendant or on his behalf, the attachment shall be made by a notice to such Court or officer, requesting that the money or security may be held subject to the further order of the Court by which the notice may be issued. Provided that, if such money or security is in deposit in any Court of justice, any question of title or priority which may arise between the decree-holder and any other person, not being the defendant, claiming to be interested in such money or security by virtue of any assignment, attachment, or otherwise, shall be determined by the Court in which such money or security is in deposit.

Proviso.

This proviso is inserted to give the Court the power which legitimately belongs to it, as the *custodian* of the money, to settle all questions of distribution in regard to different claimants advancing claims for its appropriation. For instance, Rs. 500 is in deposit in the Hooghly Court, the proceeds of sale of *A's* property, in execution of *B's* decree. *C*, who holds a decree of the Burdwan Court against *A*, causes the latter Court to send a notice, under this Section, to Hooghly, to stop the money in deposit from being paid away. The Hooghly Court will decide the question of distribution. For instance, if it find that *B's* attachment was prior in point of time to that of *C*, it will cause payment to be first made to *B* under Section 270, and

pay the surplus to *C*. Orders passed under this Section are not open to appeal.

Held by the Bombay Sudder Court, 18th July and 2nd October 1860: "That the salary of a Government servant, is not attachable as *such*, but only after it has become a *debt*, and that their Circular Order No. 34 is therefore no longer applicable or operative."

Held by the Madras Sudder Court, 1st March 1861: "A Sepoy's pay is not liable to attachment in execution of a decree for maintenance."

SECTION 238.

Attachment of negotiable instruments by seizure.

Where the property shall consist of a negotiable instrument, the attachment shall be made by actual seizure, and the nazir or other officer shall bring the same into Court, and such instrument shall be held subject to the further orders of the Court.

Such as Government promissory notes in the name of the defendant, or bills of exchange and bonds in his favor.

SECTION 239.

When the attachment is by prohibitory order, how the order is to be made known.

In the case of goods, chattels,* or other movable property, not in the possession of the defendant, the written order shall be fixed up in some conspicuous part of the Court-house, and a copy of the order shall be delivered or sent registered by post to the person in possession of the property. In the case of lands, houses, or other immovable property, the written order shall be read aloud at some place on or adjacent to such lands, houses, or other property, and shall be fixed up in some conspicuous part of the Court-house; and when the property is land, or any interest in land, the written order shall also be fixed up in the office of the collector of the zillah in which the land may be situated. In the case of debts, the written order shall be fixed up in some conspicuous part of the Court-house, and copies of the written order shall be delivered or sent registered by post to each individual debtor. And in the case of shares in the capital or joint-stock of any railway, banking, or other public company or corporation, the written order shall in like manner be fixed up in some conspicuous part of the Court-house, and a copy of the order shall be delivered or sent registered by post to the manager, secretary, or other proper officer of the company or corporation.

The Courts should be careful to see that the procedure laid down in this and the other Sections of this Chapter are strictly carried out.

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* The word *chattels* is here used in its popular signification, which is, "any movable possession." But the legal signification includes also "estates or interests in land." It is not easy to say in which sense it is used in this chapter of the Code; if in the popular sense, as would seem from a comparison of Sections 233 and 235, the introduction of it is unnecessary, as it would express no more than the word "goods."

SECTION 240.

Any private alienation of property after attachment to be void.

After any attachment shall have been made by actual seizure, or by written order as aforesaid, and, in the case of an attachment by written order, after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise, and any payment of the debt or debts, or dividends or shares, to the defendant, during the continuance of the attachment, shall be null and void.

This Section points out the effects of attachment.

Property under attachment, if alienated by the defendant, may, notwithstanding, be brought to sale. Parties paying to the defendant the amount of debts which have been attached, are liable to pay the same to the decree-holder on being sued by him, or to the purchaser, in case of sale of such debts in execution.

SECTION 241.

Payment by a debtor who has been prohibited from making payment to his creditor.

In every case in which a debtor shall be prohibited from making payment of his debt to the creditor, he may pay the amount into Court, and such payment shall have the same effect as payment to the party entitled to receive the debt.

This will greatly relieve debtors from the accumulation of interest on bonds, or other securities bearing interest.

SECTION 242.

The Court may direct money or bank-notes to be paid to the plaintiff;

or other attached property to be sold, and proceeds to be paid to him.

In all cases of attachment under the preceding Section it shall be competent to the Court, at any time during the attachment, to direct that any part of the property so attached as shall consist of money or bank-notes, or a sufficient part thereof, shall be paid over to the party applying for execution of the decree; or that any part of the property so attached as may not consist of money or bank-notes, so far as may be necessary for the satisfaction of the decree, shall be sold, and that the money which may be realised by such sale, or a sufficient part thereof, shall be paid to such party.

This Section is enacted to prevent delay in the execution of decrees. Where the property of a defendant is attached, and claims are preferred to a portion of it, there ought to be no delay in paying over to the decree-holder undisputed property in the nature of cash, such as bank-notes, or in selling such undisputed property of other descriptions as can be promptly sold and the proceeds thereof *distributed*.

SECTION 243.

When the property attached shall consist of debts due to the party who may be answerable for the amount of the decree, or of any lands, houses, or other immovable property, it shall be competent to the Court to appoint a manager of the said property, with power to sue for the debts, and to collect the rents or other receipts and profits of the land or other immovable property, and to execute such deeds or instruments in writing as may be necessary for the purpose, and to pay and apply such rents, profits, or receipts towards the payment of the amount of the decree and costs; or when the property attached shall consist of land, if the judgment-debtor can satisfy the Court that there is reasonable ground to believe that the amount of the judgment may be raised by the mortgage of the land, or by letting it on lease, or by disposing by private sale of a portion of the land of of any other property belonging to the judgment-debtor, it shall be competent to the Court, on the application of the judgment-debtor, to postpone the sale for such period as it may think proper, to enable the judgment-debtor to raise the amount. In any case in which a manager shall be appointed under this Section, such manager shall be bound to render due and proper accounts of his receipts and disbursements from time to time as the Court may direct.*

Where the property attached consists of debts or immovable property, a manager may be appointed.

Court may postpone sale of land, if satisfied that amount of judgment may be raised by mortgage, &c.

Manager to render accounts.

When a manager is appointed under this Section, security is to be taken from him in the usual manner. Orders passed under this Section are not appealable.

"54. The attention of the Courts is called to the provisions of Sections 243 and 244, which confer on them the power of postponing, at the instance of the judgment-debtor, a sale in execution of a decree, if they are satisfied that the amount can be raised by mortgage or lease. Care must be taken that this power is not so exercised as to inflict an injury on the decree-holder."—*S. C. Cir. Or., 29th July* 1859.

SECTION 243 *a*.

[Section 14, Act XXIII. of 1861.]

When the land sold in execution of a decree is a share of a putteedaree estate paying revenue to Government, as defined in Section 2, Act I. of 1841, (*for facilitating the collection of the revenue of Government and defining the interest intended to be conveyed by public sales for the realisation of arrears of the public revenue in putteedaree estates*), if the

Co-sharer of a share of a putteedaree estate, sold in execution of decree, may claim to take the share at the sale price.

* By the English law the writ issued in execution, if the debtor's personal property be insufficient, "gives to the judgment-creditor the lands and tenements of the judgment-debtor, to be occupied and enjoyed until the money due on such judgment is fully paid." There seems no reason why this procedure should not be adopted in India, instead of the modes heretofore in use, from which the text authorises but a slight departure.

lot shall have been knocked down to a stranger, any co-sharer other than the judgment-debtor, or any other member of the coparcenary, may claim to take the share sold at the sum at which the lot was knocked down. Provided that the claim be made on the day of sale, and that the claimant fulfil all the conditions of the sale.

Proviso.

This rule is in conformity to that in Act I. of 1845, admitting a right of pre-emption, when a share of a putteedaree estate is sold for arrears of revenue, and to the previous practice in the N. W. Provinces of the Bengal Presidency, enjoined by a Circular Order of the Agra Sudder Court.

SECTION 214.

When in any district, where land paying revenue to Government is ordinarily sold by the collector, as provided in Section 248, the property attached shall consist of any such land, or of a share in any such land, if the collector shall represent to the Court that the public sale of the land or share is objectionable, and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorise the collector, on security for the amount of the decree or for the value of such land or share being given, to make provision for such satisfaction in the manner recommended by the collector, instead of proceeding to a public sale of the land or share.

Court may authorise collector to stay public sale of land, if decree can be satisfied by a temporary alienation of it, and security be given.

Heretofore, the sale of land was the only means under the law of satisfying decrees against the proprietors. This frequently led to the impoverishment of great families, when the dues of creditors might have been fully but gradually satisfied from the incomes of their estates. It also tended to unsettle the landed interest and to create discontent in those who, through its operation, had been reduced from affluence to poverty, particularly in those parts of the country where the British rule has not been long established. It was at one time considered advisable altogether to interdict the sale of lands in execution of decrees. By this Section an opportunity is allowed to prevent such mischief as had previously occurred by the operation of the law. The considerations adverted to should, as far as practicable, lead the collector and the Court to act conformably to the provisions of this and the preceding Sections. The provision is in some respects similar to what is now the rule in some of the extra-regulation provinces of this Presidency. In the districts comprising the South Western Frontier Agency, estates paying revenue to Government are not sold in execution of decrees.

Many cases will occur, in which, by enforcing the provisions of these Sections, families will be saved from utter ruin, not only without the least injury to the interest of the decree-holder, but sometimes with benefit to him. Orders passed under this Section are not open to appeal. The security required under the Section may be taken by the Court, or, under its order, by the collector.*

SECTION 245.

Order for withdrawal of attachment after satisfaction of the decree.

If the amount decreed, with costs and all charges and expenses which may be incurred by the attachment, be paid into Court, or if satisfaction of the decree be otherwise made, an order shall be issued for the withdrawal of the attachment; and if the defendant shall desire it and shall deposit in Court a sum sufficient to cover the expense, the order shall be proclaimed or intimated in the same manner as hereinbefore prescribed for the proclamation or intimation of the attachment; and such steps shall be taken as may be necessary for staying further proceedings in execution of the decree.

Held by the Bombay Sudder Court, 28th June 1860, that when, after a settlement between the parties out of Court, the defendant does not appear to receive attached property, the costs of notice to him must be deducted therefrom, or restoration of the property delayed.

"If satisfaction of the decree be otherwise made." By private adjustment, or it may be by obtaining cross-judgment. The defendant may desire, for removing any flaw in his title, to have the removal of attachment as publicly proclaimed as the attachment itself.

* It will have been seen from the remarks on Section 194, that a similar arrangement was admissible under the old law. The obstacle was the difficulty of obtaining the consent of the decree-holder, who generally aims at the acquisition of the land, even by fraud. Under this rule, his consent will not be necessary. The rule, however, is very limited and uncertain in its operation. It is applicable to revenue-paying lands, and that only when such lands are liable to be sold by the collector, so that the owners of lakhiraj lands, jaghires, &c., are cut off from its benefits. Moreover, what is to induce the collector to move the Court in this matter, for the benefit of the debtor? As the provision is dictated by policy, that which is now discretionary should be made obligatory in all cases.

As the land becomes hypothecated by the arrangement, sanctioned under this Section, there is no occasion for the security which is prescribed.

The consideration paid by the law of England to the landed interest and persons in difficulties, has not been shown to those classes in India. The equity of redemption is unknown to Indian law. *Summum jus, summa injuria*—the rigorous enforcement of right results in extreme wrong. This omission is undoubtedly owing to the absence of a community of interest between the Legislators and the classes alluded to. Recent events have forced the subject into notice, but as yet with partial effect. The entire question requires to be re-considered.

Of Claims to Attached Property.

SECTION 246.

How claims and objections to sale of attached property are to be investigated.

In the event of any claim being preferred to, or objection offered against, the sale of lands or any other immovable or movable property, which may have been attached in execution of a decree, or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding Section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in Section 220. And if it shall appear to the satisfaction of the Court, that the land or other immovable or movable property was not in the possession of the party against whom execution is sought, or of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him, at the time when the property was attached, or that, being in the possession of the party himself at such time, it was so in his possession not on his own account or as his own property, but on account of or in trust for some other person, the Court shall pass an order for releasing the said property from attachment. But if it shall appear to the satisfaction of the Court that the land or other immovable or movable property was in possession of the party against whom execution is sought, as his own property, and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him at the time when the property was attached, the Court shall disallow the claim. The order which may be passed by the Court under this Section shall not be subject to appeal; but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order.

Vide remarks on Section 226. The procedure laid down in this Section will apply to attachments after decree, as well as to those before decree under Sections 86 and 159. It includes the attachment of both movable and immovable property.

By parity of reasoning, the rules of this Section will apply to attachments of the property of defaulting witnesses, authorised by Section 159.

Held by the Madras Sudder Court, 1st October 1860: "The object of the concluding portion of this Section is, not to keep the attachment open for the claimant, but to *limit the period within which he may bring a suit* to establish his right to the property attached. The order disallowing the claim not being subject to appeal, the Court may in its discretion proceed to sell the property."

SECTION 247.

Claims and objections to be preferred at the earliest opportunity.

The claim or objection shall be made at the earliest opportunity to the Court which shall have ordered the attachment; and if the property to which the claim or objection applies, shall have been advertised for sale, the sale may (if it appear necessary) be postponed for the purpose of making the investigation mentioned in the last preceding Section. Provided that no such investigation shall be made, if it appear that the making of the claim or objection was designedly and unnecessarily delayed, with a view to obstruct the ends of justice. The order disallowing the investigation shall not be subject to appeal, and the claimant shall be left to prosecute his claim by a regular suit.

Under the former practice, a claim was not entertained if it was not filed within one month after the date of attachment. A very large discretion is given, by this Section, to the Courts, to enable them to prevent impediments being vexatiously thrown in the way of the execution of decrees.

Held by the Madras Sudder Court, 1st October 1860:

"If property be attached by order of a District Moonsiff, any claim or objection which the collector may have to make, in respect of such property, may be preferred through one of the pleaders practising in the Court of such District Moonsiff.

"There is no provision in the Act, under which a claim, preferred to property attached by one Court, can be called up by the Civil Judge and referred to another Court for investigation.

"Regulation I. of 1832, of the Madras Code, which does not relate to procedure, but provides punishment for certain fraudulent acts, is not superseded by the Code."*

Of Sales in Execution of Decrees.

SECTION 248.

Sales to be by public auction.

Execution as to negotiable securities and shares in public companies.

Sales in execution of decrees shall be conducted by an officer of the Court, or by any other person whom the Court may appoint, and shall in all cases be made by public auction in the manner hereinafter mentioned. Provided that, if the property to be sold shall consist of negotiable securities or of shares in any railway, banking, or other public company or corporation, it shall be competent to the Court, instead of directing the sale to be made by public auction, to authorise the sale of such securities or shares through a

* It is included among the laws repealed by Act X. of 1861.

broker at the market-rate of the day. If the property to be sold shall be land paying revenue to Government, and the Government shall so direct, the sale shall be conducted by the collector on the requisition of the Court.

Sale by collector of lands paying revenue to Government.

It has been found by experience, that negotiable securities are more advantageously sold by respectable brokers than by public auction. Hence the provision to that effect. On a reference recently made by the Judge of Beerbhoom, it was held by the Calcutta Sudder Court, that until the Government vests collectors generally, or any collector particularly, with the power of selling revenue-paying land in execution of decrees, the zillah judges are, under this Section, to effect such sales by means of officers of their own Courts.

"55. Sales of land paying revenue to Government are only to be made through the collector under Section 248, in the event of the Government so directing. Where no special authority has been given by the Government to the Collector, they will be held as heretofore by an officer of the Civil Court."—*S. C. Cir. Or.*, 29*th July* 1859.

The Calcutta Sudder Court held, 6th September 1859, that this Code does not change the existing practice, in respect to the percentage payable to the persons who are employed to sell property in execution of decrees.

Held by the Madras Sudder Court, 1st October 1860: "Until the Government vests Collectors generally, or any Collector particularly, with the power of selling revenue-paying land in execution of decrees, the Courts are, under this Section, to effect such sales by means of their own officers."

SECTION 249.

In all cases of intended sale by public auction, whether of movable or immovable property, in execution of a decree, a proclamation of the intended sale, specifying the time and place of sale, the property to be sold, the revenue assessed upon the estate when the property to be sold is an estate or a part of an estate paying revenue to Government, and the amount for the recovery of which the sale is ordered, together with any other particulars that the Court may think necessary, shall be made in the current language of the district. The proclamation shall also declare that the sale extends only to the right, title, and interest of the defendant in the property specified therein. Such proclamation shall be made on the spot where the property is attached, by beat of drum, or in such other mode as may be customary; and a written notification to the same effect shall be affixed in the Court-house of the judge who shall have ordered the sale, and in some conspicuous spot

Proclamation and notification of sales by public auction.

in the town or village in which the attachment may have taken place. When the property ordered to be sold may consist of land or of any right or interest in land, the written notification shall also be affixed in the office of the collector of the district in which such land is situate, and in the Court-house of the principal Civil Court of the district, where the Court which ordered the sale is subordinate to such Court. The sale shall not take place until after the expiration of at least thirty days in the case of immovable property, and of at least fifteen days in the case of movable property, calculated from the date on which the notification shall have been affixed in the Court-house of the judge ordering the sale.

Time of sale.

In the terms of Clause 7, Section 3, Regulation VII. of 1825, of the Bengal Code, and Section 10, Act IV. of 1846, the Courts will distinctly proclaim that the sale is only of the right, title, and interest of the defendant in the property put up to sale; though the Courts will assist the purchaser in getting possession of his purchase, as far as possible, under Section 261 and the following Sections. There is to be a proclamation of sale by beat of drum or other customary mode, and a notification in some conspicuous part of the village where the attachment has taken place. There is to be a notification in the Court-house of the Court ordering the sale, and, in case of sale of immovable property, in the collector's office and the Court-house of the principal Civil Court of the district.

It is expected that the local notification and proclamation will be so issued as to leave a reasonable interval between their issue and the sale. For instance, the Court will not proceed with a sale on the 10th of the month, when the proclamation and notification at a distant place have been made only on the 8th of that month, although the notification may have been affixed in the Court-house more than thirty days before the sale-date in the case of immovable, and fifteen days in the case of movable property.

SECTION 250.

The usual process for attachment and sale when the property to be attached consists of goods, chattels, or other personal estate other than debts, may be issued either successively or simultaneously, as the Court directing the sale may in each instance think proper.

The process for attachment and sale may, in certain cases, be issued simultaneously.

For the sale of movable property other than debts, it would be for the benefit of the debtor to have the two processes issued simultaneously. The longer such property is kept

under attachment, the greater is the risk of its being wasted, damaged, lost, or stolen. The practice under the former law was similar to the provision of this Section.—*Vide* Clause 3, Section 3, Regulation VII. of 1825, of the Bengal Code.

SECTION 251.

Mode of payment on sale of movable property.

In all cases of sale of movable property, the price of every lot shall be paid for at the time of sale, or as soon after as the officer holding the sale shall direct; and in default of such payment, the property shall forthwith be again put up and sold. On payment of the purchase money, the officer holding the sale shall grant a receipt for the same, and the sale shall become absolute.

In the sale of movable property, the price of each lot is to be paid for at the time of the bid. The defaulting bidder is not responsible for any deficiency of price on its re sale.

SECTION 252.

Irregularity not to vitiate sale of movable property, but any person injured may recover damages by suit.

No irregularity in the sale of movable property under an execution shall vitiate the sale; but any person who may sustain any injury by reason of such irregularity may recover damages by a suit in Court.

SECTION 253.

Deposit by purchaser in case of sale of immovable property.

In all cases of sale of immovable property, the party who is declared to be the purchaser shall be required to deposit immediately 25 per centum on the amount of his bid, and in default of such deposit the property shall forthwith be again put up and sold.

There is no provision for making the party who is declared the purchaser liable for any loss which may be sustained by a re-sale, in consequence of his default to make the deposit; and, from the silence of the law regarding this point and the liability imposed, by the next Section, on the purchaser who fails to make good the full amount of purchase money, it is to be inferred that he is to be considered irresponsible for not paying the amount of deposit.

SECTION 254.

At what time full amount of purchase money to be made good.

The full amount of purchase money shall be made good by the purchaser before sunset of the fifteenth day from that on which the sale of the property took place, or, if the fifteenth day be a Sunday or other close holiday, then on the first office day after the fi-

tcenth day; and in default of payment within such period, the deposit, after defraying the expenses of the sale, shall be forfeited to Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold. If the proceeds of the sale which is eventually consummated be less than the price bid by such defaulting purchaser, the difference shall be leviable from him under the rules for enforcing the payment of money in satisfaction of a decree of Court.

Procedure on default.

Defaulting purchaser answerable for loss by re-sale.

The day of sale is not to be reckoned in calculating the fifteen days. The rule laid down in this Section is similar to the existing practice.

SECTION 255.

Every re-sale of immovable property, in default of payment of the purchase money, shall be made after the issue of a fresh notification, in the manner and for the period prescribed for original sales.

Notification on re-sale of immovable property.

In case of re-sale, the usual proclamation is to be made, and the notification affixed under the rules of Section 249.

SECTION 256.

No sale of immovable property shall become absolute until the sale has been confirmed by the Court. At any time within thirty days from the date of the sale, application may be made to the Court to set aside the sale on the ground of any material irregularity in publishing or conducting the sale; but no sale shall be set aside on the ground of such irregularity, unless the applicant shall prove to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.

Confirmation of sale.

Vide remarks on Section 226.

Held by the Bombay Sudder Court, 28th June 1860: "The proper procedure under this and the following Section is to delay confirmation of a sale of immovable property, until the expiration of the period within which adverse claims may be preferred, *i. e.* one month."

SECTION 257.

If no such application as is mentioned in the last preceding Section be made, or if such application be made and the objection be disallowed, the Court shall pass an order confirming the sale; and in like manner if such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale for irregularity. If the objection be allowed, the order made to set aside the sale shall be final; if the objection be disallowed, the order confirming the sale shall be open to appeal; and such order, unless appealed from, and, if appealed from, then the order passed on the appeal, shall be final; and

The sale, if not objected to for irregularity, or if the objection be disallowed, shall become absolute.

When the order confirming a sale shall be final.

the party against whom the same has been given shall be precluded from bringing a suit for establishing his claim.

The provision of this Section sets aside the former practice. Under that practice both the debtor and purchaser were allowed to appeal from an order confirming or reversing a sale. One appeal is now permitted to the debtor, when the sale of his property is confirmed, thereby removing all chances of unjustly losing his property. For evident reasons, this concession is not made in favor of the purchaser. When the sale is finally confirmed, the debtor is precluded from bringing a regular suit to establish his title. Formerly he could bring his suit within twelve years from the date of sale.

SECTION 258.

If the sale be set aside, price to be returned to purchaser.

Whenever a sale of immovable property is set aside, the purchaser shall be entitled to receive back his purchase money, with or without interest, in such manner as it may appear proper to the Court to direct in each instance.

Whether the Court will allow interest or not to purchasers will depend upon the merits and circumstances of each particular case. It can be charged either to the debtor or to the decree-holder, according as the one or the other may be in fault in bringing about or leading to the sale. If the error be the fault of the Court or its officers, it will require some consideration to determine who is to bear the loss.

The Bombay Sudder Court held, on a reference from the Judge of Poona, that this Section contemplates the award of interest in special cases only, which must be adjudicated on as they arise.

Held by the Bombay Sudder Court, 2nd October 1860, in reply to a question, as to the measures to be adopted if the party, to whom the purchase money had been already paid, refuse to refund it, "that, as the law authorises the Court to order the refund, the power to enforce its order must be implied; and therefore that, if repayment were not made, the defaulter should be sent to jail for contempt, until he might make it."

SECTION 259.

Certificate to be granted to the purchaser of land.

After a sale of immovable property shall have become absolute in manner aforesaid, the Court shall grant a certificate to the person who may have been declared the purchaser at such sale, to the effect that he has purchased the right, title, and interest of the defendant in the property sold; and such certificate shall be taken and deemed to be a valid transfer of such right, title, and interest.

SECTION 260.

Certificate to state the name of actual purchaser.

Suit of benamee purchaser to be dismissed.

The certificate shall state the name of the person who at the time of sale is declared to be the actual purchaser; and any suit brought against the certified purchaser, on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed, with costs.

This Section contains a provision similar to that contained in Section 36, Act XI. of 1859. This will, to a great extent, prevent benamee purchases.

"56. Section 260 prohibits suits for the recovery of lands sold in execution of a decree when founded on the plea that they were purchased benamee."—*S. C. Cir. Or., 29th July* 1859.

SECTION 261.

Delivery of movable property in the possession of defendant.

Where the property sold shall consist of goods, chattels, or other movable property in the possession of the defendant, or to the immediate possession of which the defendant is entitled, and of which actual seizure has been made, the property shall be delivered to the purchaser.

SECTION 262.

Delivery of movable property to which defendant is entitled, subject to lien.

Where the property sold shall consist of goods, chattels, or other movable property to which the defendant is entitled, subject to a lien or right of any person to the immediate possession thereof, the delivery to the purchaser shall, as far as practicable, be made by giving notice to the person in possession, prohibiting him from delivering possession of the property to any person except the purchaser thereof.

SECTION 263.

Delivery of immovable property in the occupancy of defendants, &c.

If the property sold shall consist of a house, land, or other immovable property, in the occupancy of a defendant or some person on his behalf or of some person claiming under a title created by the defendant subsequently to the attachment of such property, the Court shall order delivery thereof to be made by putting the party to whom the house,

land, or other immovable property may have been sold, or any person whom he may appoint to receive delivery on his behalf, in possession thereof, and if need be, by removing any person who may refuse to vacate the same.

SECTION 264.

Delivery of immovable property in the occupancy of ryots, &c.

If the property sold shall consist of land or other immovable property in the occupancy of ryots or other persons entitled to occupy the same, the Court shall order delivery thereof to be made by affixing a copy of the certificate of sale in some conspicuous place on the land or other immovable property, and proclaiming to the occupants of the property by beat of drum, or in such other mode as may be customary, at some convenient place or places, that the right, title, and interest of the defendant has been transferred to the purchaser.

SECTION 265.

Delivery of debts not being negotiable instruments, and of shares in public companies.

Where the property sold shall consist of debts not being negotiable instruments, or of shares in any railway, banking, or other public company or corporation, the delivery thereof shall be by a written order of the Court, prohibiting the creditor from receiving the debts and the debtor from making payment thereof to any person or persons, except the purchaser, or prohibiting the person in whose name the shares may be standing, from making any transfer of the shares to any person except the purchaser, or receiving payment of any dividends thereon, and the manager, secretary, or other proper officer of the company or corporation from permitting any such transfer or making any such payment to any person except the purchaser.

SECTION 266.

Delivery of negotiable securities, of which actual seizure has been made.

Where the property sold shall consist of negotiable securities of which actual seizure has been made, the same shall be delivered to the purchaser thereof.

This and the following Sections contain provisions for giving possession to purchasers according to the nature of the property sold. The rules are very similar to those laid down in the first part of this Chapter, for giving possession to decree-holders of property adjudged to them.—*Vide Sections* 200 *to* 223.

SECTION 267.

Transfer of securities and shares.

If the endorsement or conveyance of the party, in whose name any negotiable security or any share in a public company or corporation is standing, shall be required to transfer the same, the judge may endorse the security or the certificate of the share, or may execute such other document as may be necessary for transferring the same. The endorsement or execution shall be in the following form, or to the like effect—"A. B. by C. D., judge

of the Court of *(or as the case may be,)* in a suit by E. F. *versus* A. B." Until the transfer of such security or share, the judge may, by order, appoint some person to receive any interest or dividend due thereon, and to sign receipts for the same; and any endorsement made, or document executed, or receipts signed, as aforesaid, shall be as valid and effectual for all purposes, as if the same had been made, or executed, or signed, by the party himself.

The provision of this Section is similar in principle to Section 202. The provision for the appointment of some person to receive interest or dividends, is made to meet those cases where delay may occur in effecting a transfer of securities, in the way indicated in this Section; for instance, when a claimant to the securities brings a regular suit, after their sale, to establish his right, and obtains an injunction to stop their transfer to the purchaser.

SECTION 268.

Resisting or obstructing purchasers in obtaining possession of property.

If the purchaser of any immovable property, sold in execution of a decree, shall be resisted or obstructed in obtaining possession of the property, the provisions contained in Sections 226, 227, and 228, relating to resistance or obstruction to a party, in whose favor a suit has been decreed, in obtaining possession of the property adjudged to him, shall be applicable in the case of such resistance or obstruction.

SECTION 269.

Obstruction by claimants other than defendants.

If it shall appear that the resistance or obstruction to the delivery of possession was occasioned by any person, other than the defendant, claiming a right to the possession of the property sold, as proprietor, mortgagee, lessee, or under any other title, or if, in the delivery of possession to the purchaser, any such person claiming as aforesaid shall be dispossessed, the Court, on the complaint of the purchaser, or of such person claiming as aforesaid, if made within one month from the date of such resistance or obstruction, or of such dispossession, as the case may be, shall inquire into the matter of the complaint and pass such order as may be proper in the circumstances of the case. The order shall not be subject to appeal; but the party against whom it is given shall be at liberty to bring a suit to establish his right, at any time within one year from the date thereof.

The provision of this Section is similar in principle to that of Sections 229 and 230. The actual sale of the property, after attachment by prohibitory order, affords a presumption that time had been afforded to all interested persons to urge their claims to it. The provision may therefore be rarely necessary. In the event, however, of such claims being made for the first time at so late a period, the inquiry into them is to be of a summary nature. But to afford the amplest opportunity for establishing well founded

claims, the party claiming the property or evicted from it is allowed to bring a regular suit within the prescribed time, but at his own expense.

SECTION 270.

Attaching creditor to be first paid out of proceeds of property sold.

Whenever property is sold in execution of a decree, the person, on whose application such property was attached, shall be entitled to be first paid out of the proceeds thereof, notwithstanding a subsequent attachment of the same property by another party in execution of a prior decree.

Vide remarks on Section 226.

"57. Sections 270 and 271 introduce an important alteration in the principle on which sale-proceeds have hitherto been distributed."—*Cal. S. C. Cir.·Or., 29th July* 1859.

SECTION 271.

Surplus to be ratably distributed among decree-holders, who have taken out execution prior to the order for distribution.

Proviso where property is sold subject to a mortgage.

If, after the claim of the person, on whose application the property was attached, has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed ratably amongst any other persons who, prior to the order for such distribution, may have taken out execution of decrees against the same defendant, and not obtained satisfaction thereof. Provided that, when any property is sold subject to a mortgage, the mortgagee shall not be entitled to share in any surplus arising from such sale.

To enable a decree-holder to share ratably, after the first attaching decree-holder is satisfied, it is not necessary that he should attach the property. He will be entitled, if he have taken out execution, that is, obtained an order for the issue of the warrant under Section 221. The mortgagee is not entitled to a share of the proceeds, as the sale takes place subject to his mortgage.

SECTION 272.

Court may, on application, order another decreeholder to be satisfied out of proceeds of property attached under a decree obtained fraudulently.

If it shall appear to the Court, upon the application of a decreeholder, that any other decree, under which property has been attached, was obtained by fraud or other improper means, the Court may order that the applicant shall be satisfied out of the proceeds of the property attached, so far as the same may suffice for the purpose, if such other decree be a decree of that Court, or, if it be a decree of another Court, may stay the proceedings,

to enable the applicant to obtain a similar order from the Court by which the decree was made.*

This Section in principle is the same as the Circular Order of the Calcutta Sudder Court, dated 2nd February 1849, which was as follows:

"The C. O. No. 31, dated 26th November 1847 (printed C. O. book) is hereby cancelled.

"In modification of the rules contained in Construction 935 and 1056, and in C. O. No. 42, dated 26th January 1844, the Court of Sudder Dewanny Adawlut are pleased to prescribe that, to give a title to share in the proceeds of sale ratably, the claimant must take out process of attachment previous to the sale of the property. Further, they direct that, before any distribution of the assets, the attaching decree-holder shall be reimbursed from them the charges which he has actually incurred. All decrees, however, are not to be indiscriminately satisfied by the holders of them being allowed to share ratably in the assets; but the Courts are competent to consider whether claims to do so are founded upon collusive decrees or not, and to satisfy those in the first instance which may appear to have been passed in *bonâ fide* suits. These instructions are founded upon the principle that decrees are good as between the parties themselves, but cannot affect the rights of others."

It is absolutely necessary for the ends of justice that the Courts should have the power of rejecting the claims of collusive decreeholders to share with *bonâ fide* creditors. When

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* The provision of this Section is similar to that of Section 90.

Section 3 declares that no judgment of a Court shall be liable to be revised, except by that Court or a Court of Appeal on an application for such revision. Both measures may tend to the *modification* or *reversal* of the decree, but both must be at the instance of *the party cast*. But Sections 90 and 272 provide for the *nullification* of a decree at the instance of *any person*, though he had never been connected with it even as a third party. Moreover, while the proceedings, by which a review of judgment or an appeal is to be obtained, are laid down, the measures by which decrees may be rendered null and void, under these Sections, are left quite indeterminate. How it is to "appear to the Court" that a certain decree, which has become final and *irreversible*, is tainted with fraud and should be rendered *inoperative*, is not suggested. The permission thus granted to set aside a formal decree indirectly is quite at variance with the generally understood principle, (according to Blackstone,) that "the records of the Courts," (of which decrees are merely transcripts,) "are of such high and supereminent authority, that their truth is not to be called in question," and that "nothing shall be averred against a record, nor shall any plea, or even *proof*, be admitted to the contrary." The rule in this Code allows any one to impugn the verity of any judgment, and any judge summarily, and perhaps upon mere *appearances* and *suppositions*, to declare a decree solemnly passed no better than a device for a fraudulent purpose. Nothing can be more calculated to bring the judgments of the Courts into contempt, or at least to render them objects of general suspicion. For, while such a rule is extant, what decree but will appear *primâ facie* as a scheme of iniquity rather than a judicial and unquestionable determination of facts!

a *bonâ fide* application and a collusive one are made to the same Court, founded on decrees passed by itself, the matter may easily be disposed of. When, however, the application for participation is founded on a collusive decree passed by another Court, the Court which has the disposal of the money should act up to the meaning and intent of this Section, by allowing time to the decreeholder of his Court to apply to the other Court. Orders passed under this Section, whether in the one Court or the other, are not open to appeal.

*Of Arrest in Execution of Decrees for Money.**

SECTION 273.

On what grounds application for discharge may be made.

Form of application.

Verification.

Any person arrested under a warrant in execution of a decree for money may, on being brought before the Court, apply for his discharge† on the ground that he has no present means of paying the debt, either wholly or in part, or, if possessed of any property, that he is willing to place whatever property he possesses at the disposal of the Court. The application shall contain a full account of all property‡ of whatever nature belonging to the applicant, whether in expectancy or in possession, and whether held exclusively by himself or jointly with others, or by others in trust for him, (except the necessary wearing apparel of himself and his family, and the necessary implements of his trade,) and of the places respectively where such property is to be found, or shall state that, with the exceptions above-mentioned, the applicant is not possessed of any property; and the application shall be subscribed and verified by the applicant in the manner hereinbefore prescribed for subscribing and verifying plaints.

The provisions of this Section are somewhat similar to those of Section 10, Regulation II. of 1806. The provisions of this Code, as of the law under that Regulation, offer little inducement to debtors to apply for their discharge under it. As there is no final discharge from liability for any decree above Rupees 100, (vide Section 282,) except according to the provisions of Section 278, debtors will rather try, as they did before, to satisfy the decree, than have recourse to a measure which will not give them any permanent advantage.

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* *Release of Insolvent Debtors*, may properly be added to the heading.

† See note on Section 212, for the reasons why this inquiry should be previously made. A poor and ignorant debtor will never think of making such an application. The smallness of the sum for which he is being dragged into prison, should of itself induce the Court to make the inquiry.

‡ How can any person present such a statement of his property, the moment he is "arrested and brought before the Court?" Even if his property be *nil*, he may have no time to prepare his application in form, with the required verification, unless the Court keep blank forms of such applications, which require only to be signed before some officer.

The object of these provisions evidently is to save honest debtors from the disgrace of being thrown into jail, by giving them an opportunity of at once coming before the Court and making a full disclosure of their property.

The application containing the statement will be subscribed and verified as plaints under Section 27.

The necessary implements of trade are not exempted from attachment and sale in execution of decree.

Section 274.

[Repealed by Section 4, Act XXIII. of 1861, and re-enacted by Section 8, as follows.]

Procedure on application for discharge by a person arrested in execution of a decree for money.

When a person arrested under a warrant in execution of a decree for money shall, on being brought before the Court, apply for his discharge on either of the grounds mentioned in Section 273 of Act VIII. of 1859, the Court shall examine the applicant in the presence of the plaintiff or his pleader, as to his then circumstances and as to his future means of payment, and shall call upon the plaintiff to show cause why he does not proceed against any property of which the defendant is possessed and why the defendant should not be discharged; and should the plaintiff fail to show such cause, the Court may direct the discharge of the defendant from custody. Pending any inquiry which the Court may consider it necessary to make into the allegations of either party, the Court may leave the defendant in the custody of the officer of the Court to whom the service of the warrant was entrusted, on the defendant's depositing the fees of such officer, * which shall be at the same daily rate as the lowest rate charged in the same Court for serving process;* or if the defendant furnish good and sufficient security for his appearance at any time when called upon while such inquiry† is being made, his surety or sureties undertaking in default of such appearance to pay the amount mentioned in the warrant, the Court may release the defendant on such security.

As the plaintiff takes out execution, he is presumed to be in Court either in person, or by pleader, or by his recognized agent. Hence no notice upon him will be necessary. An order under this Section is not open to appeal.

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* The only material difference between this and the original Section (274) consists in the addition of the words between asterisks. This alteration is owing to an opinion expressed by the Bombay Sudder Court, that the Section, as it originally stood, did not authorise the levy of any fees which were not previously leviable, and that the clause in it respecting deposit of the nazir's fees must therefore be inoperative.

† It is obvious that "inquiry" spoken of in the latter portion of this Section, should be instituted *before* the issue of a warrant for the arrest of the debtor; for if the Court find that the warrant was improperly issued and the debtor unnecessarily apprehended, the wrong done will be irreparable. To arrest without inquiry is to punish the larger portion of debtors because the smaller require to be coerced.

That the Legislature should not have enacted laws for the relief of insolvent debtors in India, when the Lords' Act, in 1759, authorised the release of prisoners whose debts did not exceed £100, on delivery of their property to their creditors, may not be surprising, notwithstanding the constant references to be found in the local laws to the

Will the Court have time to examine the prisoner and the creditor, when engaged in examining plaints, preparing issues, hearing evidence, or writing out judgments? Will it not in almost all cases send the party to the jail, till it *find* a more convenient time?

SECTION 275.

Defendant liable to be again arrested, if proved guilty of fraudulent concealment of property, &c.

The discharge of the defendant under the last preceding Section shall not protect him from being arrested again and imprisoned, if it should be shown that, in the application made by him, he had been guilty of any concealment or of wilfully making any false statement respecting the property belonging to him, whether in possession or in expectancy, or held for him in trust, or had fraudulently concealed, transferred, or removed any property, or had committed any other act of bad faith; nor shall such discharge exempt from attachment and sale any property then in the possession of the defendant, or of which he may afterwards become possessed.

The discharge under Section 275 will not prevent the debtor from being again arrested, nor any property, which he may be then or afterwards possessed of, from being taken in execution.*

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principles adopted in England. It is strange, however, that when the Insolvent Court was established in Calcutta, the laws of 1806, modified in 1814 as regards debts below 64 Rs. should continue in full force, and insolvents should be obliged to come to Calcutta, from Mofussil stations, to take the benefit of the Act at the Presidency. The Regulation laws were, moreover, subversive of the *lex loci*. For, by the Hindu law, (the non-interference of authority and the existence of assets being presumed,) imprisonment of the person for debt was wholly prohibited, until all other resources had failed. The Mahomedan law, (based on the interference of the Cazi,) prohibited the immediate imprisonment of the debtor, unless the debt had been disowned by him and established on the testimony of witnesses. On the other hand, for a debt acknowleged, (and not arising from suretyship,) the debtor could not be imprisoned "unless the creditor established his solvency." Even then the Cazi was to "determine the period of imprisonment, in cases of apparent insolvency." The debtor, however, might again be arrested, "at a subsequent period, on proof of his ability to discharge the debt." This is the only provision of the Mahomedan law, which, our Regulations, though denouncing it as a barbarous system, have copied, overlooking whatever was in favour of the prisoner. That law, however, contains all the elements of the law of insolvency. For, besides the interdiction of the incarceration of debtors who had no means of liquidating their obligation, it allows creditors to "petition a Court of justice to restrain an insolvent debtor from alienating his property, by sale or other obligation." (See Macnaghten's Mahomedan Law, p. 118.) When the long continued but great imperfections of the English law are considered, the natives of India cannot complain of the defects of the laws administered to them, especially if it be remembered that the introduction of the insolvent law into India was not owing to the benevolence of the Imperial or any other Legislature, but to the foresight of a "princely merchant" whose insolvency was inevitable.

* Reviews and appeals are to be applied for within 90 days from the date of judgments. Why is an indefinite time to be allowed in the case of execution of decrees? See note to Section 281. It is to be observed that, under Section 92, Act X. of 1859, no execution of a decree can be taken out after three years from the date thereof, nor, under Sections 20 and 22 of Act XIV. of 1859, unless the decree shall have been kept in force by a proceeding within three years from the date thereof, if it appertain to an ordinary Civil Court, or within one year from such date, if it appertain to a Revenue Court.

Of the Execution of Decrees by Imprisonment.

SECTION 276.

Subsistence-money of a defendant in jail how fixed and furnished.

When defendant is committed to prison in execution of a decree, the Court shall fix whatever monthly allowance it shall think sufficient for his subsistence, not exceeding four annas per day, which shall be supplied by the party at whose instance the decree may have been executed, to the proper officer of the Court or of the jail where the defendant may be in custody, by monthly payments in advance, before the first day of each month; the first payment to be made for such portion of the current month as may remain unexpired before the defendant is committed to prison.

SECTION 277.

Court may vary the allowance in case of illness or for other special cause.

The Court may, in case of illness or for other special cause, fix the monthly allowance at such sum, not exceeding six annas per day, as shall appear necessary. The order fixing such allowance may, from time to time, be revised and altered on due cause being shown.

"Other special cause," as when the defendant is a European, whose bare necessaries of life would cost more than 4 annas. An order under this Section is not open to appeal.

SECTION 278.

Release of defendant.

Imprisonment not to be longer than two years.

Six months if decree for money not exceeding Rs. 500.

Three months if not exceeding Rs. 50.

A defendant shall be released at any time on the decree being fully satisfied, or at the request of the person at whose instance he may have been imprisoned, or on such person omitting to pay the allowance as above directed. No person shall be imprisoned on account of a decree for a longer period than two years; or for a longer period than six months, if the decree be for the payment of money not exceeding five hundred Rupees; or for a longer period than three months, if the decree be for the payment of money not exceeding fifty Rupees.

The Agra Sudder Court have ruled that the provisions of this Section were applicable to all judgment-debtors in confinement at the date of this Act coming into operation.*

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* By the statute 7 and 8 Vict. Chap. 96, no person can be charged or taken in execution, in any court, for a debt not exceeding £20, exclusive of costs. By subsequent enactments, the debtor may be examined, and, on proof that credit had been obtained by fraud, or breach of trust, may be sentenced to imprisonment for a period not exceeding forty days, without its operating in satisfaction of the debt.

This rule implies that persons who have property prefer being imprisoned for a certain period, according to the amounts of their debts. Inquiry, as suggested above, into the means possessed by the debtors, would at once indicate the inutility of proceeding against those who possess none, and the propriety of issuing process against the property of those who have any.

Held by the Madras Sudder Court, 1st October 1860: "Sections 270 to 281. The provisions of these Sections are applicable to all judgment-debtors, whether placed in confinement prior or subsequent to the date on which the Act came into operation."

In England down to the reign of George II., a person might have been perpetually imprisoned for any sum of money, however trifling. The humanity of this reign has abolished imprisonment for small debts except in cases of fraud. The same merciful regard has not been shown, either by the Royal Commissioners or the Local Legislature, to the poorer classes of insolvent debtors in India, who must be imprisoned for 90 days for the smallest debt (even for a Rupee) they have incurred. The present measure, as regards the largest period for which an insolvent debtor may be kept in duress by an unfeeling creditor, emanates from the former, founded on the laws of the Bombay Presidency. The limitation of the terms of imprisonment to three months where the debt is under 50 Rupees, and to six months where it is above 50 and below 500 Rupees, is due to the humanity of the Local Legislature. It is, however, humanity without discrimination, for it extends equally to the honest and the dishonest debtor.

Under the old law, debtors in Bengal were released after six months' imprisonment for debts not exceeding 61 Rs.; but the debts were not extinguished, and their property was "at all times" liable to attachment and sale. Debtors also, who were released, owing to the failure of their creditors to pay the subsistence money, might again be incarcerated on proof of fraudulent concealment or transfer of their property.

Held by the Bombay Sudder Court, 28th June 1860, that the Code does not give to the Courts, as it does to the decree-holder, the power of shortening the maximum terms of imprisonment, severally prescribed in this Section, according to the amount of the decree, and does not contemplate that Mofussil Courts, like the Small Cause Court at the Presidency, should adjudge specific terms of imprisonment in default of satisfaction in each case.

"Longer period than two years." If the decree be for any sum above 500 Rs., the term of imprisonment shall not exceed two years; and so with regard to the other sums mentioned.

Debtors who shall have been in prison for the periods mentioned in this Section, with reference to the amounts of the decrees against them, are not thereafter liable for the same.

SECTION 279.

Subsistence-money to be added to amount of decree.

Sums disbursed by a plaintiff for the subsistence of a defendant in jail shall be added to costs of the decree, and shall be recoverable by the attachment and sale of the property of the defendant under the foregoing rules; but the defendant shall not be detained in custody or arrested on account of any sums so disbursed.

For costs on account of subsistence, the property of the defendant may be attached and sold. No process can issue against his person.

SECTION 280.

Application by person imprisoned under a decree, for discharge on a surrender of the whole of the debtor's property.

Any person in confinement under a decree may apply to the Court for his discharge. The application shall contain a full account of all property of whatever nature belonging to the applicant, whether in expectancy or in possession, and whether held exclusively by himself or jointly with others, or by others in trust for him (except the necessary wearing apparel of himself and his family, and the necessary implements of his trade) and of the places respectively where such property is to be found; and such application shall be subscribed and verified by the applicant in the manner hereinbefore provided for subscribing and verifying plaints.

Verification.

It is to be observed that the applicant under this Section is a defendant in confinement; but under Section 273 the defendant is brought before the Court under arrest upon a warrant in execution.

The Madras Sudder Court ruled, 25th February 1860, that the application for discharge must be addressed to the Court which ordered the confinement, and should be received and forwarded to such Court, post free if necessary, by the judicial officer in charge of the jail.

This Section does not include mention, as in Section 273, "the applicant is not possessed of any property," which must be regarded as an oversight. The provision of this, being consentaneous with that of the Section cited, might well have been embodied in a single rule, including the proceedings that are to follow. It is wholly unnecessary that an insolvent debtor should be detained in custody to prove

his insolvency, the affirmative of which rests with his creditor.

The provisions on the subject are far from being either consistent with themselves, or in harmony with the enlarged views entertained at the present time. The subject is left in a state of confusion because the Local Legislature were not prepared to consider first principles, and there was no public spirited body to suggest an improvement of the law on public grounds.

SECTION 281.

Procedure on such application.

On such application being made, the Court shall cause the plaintiff to be furnished with a copy of the account of the defendant's property, and shall fix a reasonable period, within which the plaintiff may cause the whole or any part of such property to be attached and sold,* or may make proof that the defendant, for the purpose of procuring his discharge without satisfying the decree, has wilfully concealed property or his right or interest therein, or fraudulently transferred or removed property, or committed any other act of bad faith. If within such period the plaintiff shall fail to make such proof, the Court shall cause the defendant to be set at liberty. If the plaintiff shall, within the time specified, or at any subsequent period,† prove to the satisfaction of the Court that the defendant has been guilty of any of the acts above-mentioned, the Court shall, at the instance of the plaintiff, either retain the defendant in confinement or commit him to prison, as the case may be, unless he shall have already been in confinement two years on account of the decree; and may also, if it shall think proper, send the defendant to the magistrate to be dealt with according to law.

Defendant to be discharged on plaintiff's failing to prove fraud or concealment by defendant.

If guilty of fraud or concealment, debtor's imprisonment may be extended to two years;

and he may be further dealt with criminally.

As the order of discharge is passed in the presence of both parties, on proof of the debt, and while the defendant is in confinement, security is not demandable from him as under Section 274.

SECTION 282.

Though the defendant be discharged, his property is liable for the decree.

A defendant once discharged shall not again be imprisoned on account of the same decree, except under the operation of the last preceding Section; but his property shall continue liable, under the ordinary rules, to attachment and sale until the decree shall be fully

* "Cause property to be attached." All that the creditor is here required to do, should be required of him within a few weeks of his obtaining the decree.

† "*Any* subsequent period." There being no limit as to the period, a creditor may, years after the time specified, cause his judgment-debtor to be "committed to prison," on proof of the culpability here supposed.

satisfied, unless the decree shall be for a sum less than one hundred Rupees, and on account of a transaction bearing date subsequently to the passing of this Act. When the decree shall be for a sum less than one hundred Rupees, and on account of a transaction bearing date as above, the Court may declare a defendant, who shall be discharged as aforesaid, absolved from further liability under that decree.

When Court may declare a defendant absolved from further liability.

The discharge under this Section, in regard to a decree for a sum less than Rs. 100, will operate as a final and complete discharge both of his person and in respect of any property subsequently acquired. This will, however, apply to debts contracted after, but not to those contracted before, the coming of this Code into operation.*

SECTION 283.

[Repealed by Section 1, Act XXIII. of 1861, and re-enacted by Section 11, as follows.]

All questions regarding the amount of any mesne profits which, by the terms of the decree, may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable, in respect of the subject-matter of a suit, between the date of institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree, or the like,† and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree,† shall be determined by order of the Court executing the decree, and not by separate suit; and the order passed by the Court shall be open to appeal. Provided that if, upon a perusal of the petition of appeal and of the order against which the appeal is made, the Court shall see no reason to alter the order, it may reject the appeal; and it shall not be necessary in such case to issue a notice to the respondent before the order of rejection is passed.

How questions regarding amount of mesne profits and interest, and sums paid in satisfaction of decrees, &c., are to be determined.

* The bankrupt, on delivering up his property, for the benefit of his creditors, not only obtains exemption from arrest and receives some allowance from his estate for his support, but obtains a discharge from all future liability for his former debts, and is entitled to enjoy all future acquisitions of property, so that "he becomes a clear man again." By a singular inconsistency the insolvent is released from prison, but is liable to pay his old debts out of his future acquisitions, which cannot but cramp his exertions ever after. An opinion is gradually prevailing that the former rules should be observed in all cases, including freedom from arrest as a necessary preliminary to the application for relief.

The second sentence in this Section, and the clause in Section 278, relating to debtors imprisoned for sums not exceeding 50 and 500 Rs. respectively, are additions to the original draft of this Code, irreconcilable with each other. Debtors who have been in confinement for Rs. 100 and under, are by that sentence declared not liable to imprisonment after they have been discharged on any account; but the period of imprisonment which, under Section 278, is the procuring cause of their discharge, is not stated. A period cannot be deduced from analogy, for there is none in the terms of imprisonment laid down in Section 278. Is the favorable rule in this Section not to apply to those whose debts do not exceed 50 Rs., and who are entitled to release after three months?

† The original Section (283) did not contain the proviso, nor the clause included within the marks †.

This is on the principle of Construction 1129, of the 9th February 1838, which was as follows:

"Held by the Western Court, in concurrence with the Calcutta Court, that any order passed in the execution of a decree in regard to mesne profits, interest, or other matter, in dispute between the parties to the suit, which may be involved in the decision, must be looked upon as a necessary process for carrying into effect the original intentions of the Court passing the decree, in respect to a point in which it may, in fact, be said already to have pronounced a formal judgment, and cannot therefore, be considered as constituting a new cause of action."

That Construction did not include questions of adjustment after decree. For instance, if satisfaction of a decree in full or in part were pleaded, and receipts in proof of payment produced, this might have formed a new cause of action and have been made the subject of a separate suit, although summarily adjudicated upon in course of execution. But this Section provides for inquiry on the point in the course of execution of the decree, the order passed on it being subject to appeal only.

By parity of reasoning, other questions of the kind, such as the construction to be put on a decree, the Court's refusal to execute a decree, or incomplete execution of a decree, may be considered to be appealable to the Court to which an appeal from the decree itself may have been carried. The Sudder Courts, however, had held that, under the terms of Section 364, no appeal could be allowed in respect of such matters, however erroneous or unjust the order of the Court executing the decree might appear upon the face of it. It was, therefore, suggested that, in order to prevent great injustice from being done, the terms of the Section should be enlarged, so as to embrace all matters arising out of the execution of a decree as between the parties, not being matters the orders in respect to which were left by law to the discretion of such Court. The words between asterisks in this amended Section supply what was noticed in the former edition of the work as a "seeming omission" in the original Section (283). They allow the Court sufficient latitude as to the questions regarding execution of decrees, which it is competent to entertain. On the other hand, the proviso now added will prevent the power granted

to the Court from being abused by appeals manifestly groundless.—*Vide* Section 374.

The Calcutta Sudder Court ruled, 9th January 1860, with reference to Section 364, that the construction put on a decree of the Privy Council by the Court executing the decree, regarding the award of mesne profits, does not render that Court's order liable to appeal. The Madras Sudder Court adopted this ruling, 1st October 1860. These opinions will of course be altered according to the Section as it *now* stands.

The Agra Sudder Court have ruled that no special appeal lies from an order of an Appellate Court, passed on an appeal regarding execution of a decree.

SECTION 283 *a*.

[Section 12, Act XXIII. of 1861.]

An appeal from an order passed in execution of a decree, which shall have been rejected as inadmissible under Section 364 of Act VIII. of 1859, or which would have been inadmissible before the passing of this Act, but which is rendered admissible by this Act, may be admitted on an application in writing to the Court which rejected the appeal, or by which the appeal, had it been admissible before the passing of this Act, would have been cognizable, provided the application be preferred within ninety days from the date of the passing of this Act. The application may be written on the stampt paper prescribed for petitions in the Court to which it is presented, when a stamp on petitions is required.

Appeals from orders rejected under Section 364, Act VIII. of 1859, may be admitted on application.

Application to be on stampt paper.

This rule is of temporary application.

Of Execution of a Decree out of the Jurisdiction of the Court by which it was passed.

SECTION 284.

A decree of any Civil Court, within any part of the British territories in India, or established, by the authority of the Governor-General of India in Council, in the territories of any foreign prince or state, which cannot be executed within the jurisdiction of the Court whose duty it is to execute the same, may be executed within the jurisdiction of any other such Court in the manner following.

How a decree of one Court may be executed within the jurisdiction of another Court.

This embodies the provisions of Act XXXIII. of 1852. The words "Civil Courts" used in this Section include all Courts, whether established by Royal Charter or otherwise.

Held by the Madras Sudder Court, 15th December 1860, with reference to this and the following Sections:

"The Courts are only bound to execute decrees of the Mysore authorities, if application is made to them under the conditions required by these Sections."

SECTION 285.

Application for such execution.

The plaintiff in such case may apply to the Court, whose duty it is to execute the decree, to transmit a copy thereof, together with a certificate that satisfaction of such decree has not been obtained by execution within the jurisdiction of the said Court, and a copy of any order for execution of such decree that may have been passed, to the Court by which the applicant may wish the decree to be executed.

SECTION 286.

Copy of decree and order of execution to be transmitted.

The Court, unless there be any sufficient reason to the contrary, shall cause such copies and certificate to be prepared: and the same, after being signed by the judge and sealed with the seal of the Court, shall be transmitted to the Court indicated by the applicant, if that Court be within the same district, otherwise to the principal Civil Court of original jurisdiction in the district in which the applicant may wish the decree to be executed; and the Court to which such copies and certificates are transmitted shall cause the same to be filed therein, without any proof of the judgment or order for execution, or of the copies thereof, or of the seal or jurisdiction of any Court, or of the signature of any judge, unless it shall, under any peculiar circumstances to be specified in an order, require such proof.

SECTION 287.

Decree or order transmitted to be executed as that of the Court.

The copy of any decree, or of any order for execution, when filed in the Court to which it shall have been transmitted for the purpose of being executed as aforesaid, shall for such purpose have the same effect as a decree or order for execution made by such Court, and may, if the Court be the principal Civil Court of original jurisdiction in the district, be executed by such Court, or any Court subordinate thereto, to which it may entrust the execution of the same.

SECTION 288.

Execution how to be enforced by Court applied to.

When application shall be made to any Court to execute the decree of any other Court as aforesaid, the Court, to which the application shall be made or referred, shall proceed to execute the same according to its own rules in the like cases; provided that such Court shall have no power to inquire into the validity of the decree, unless it appear upon the face of the decree that the Court by which it was made had no jurisdiction to make the same.

The Court, in which a copy of a decree of a different Court and certificate under Section 286 are filed for execution of that decree, shall execute it according to its own rules. A decree of the Small Cause Court in Calcutta will

be executed in a Mofussil Court, according to the rules of the latter, and *vice versâ*.

The Madras Sudder Court explained, 16th April 1860, that the "application" here mentioned means the application made by the decree-holder either in person or by a pleader, to the Court to which the copy of the decree and certificate may have been transmitted. It also held that, where an application is made to a Civil Court, for the execution of a decree passed by a moonsiff of another jurisdiction, it must be on a stamp if the claim amounts to fifty rupees or more, otherwise it may be on plain paper.

(*Vide* Article 10, Schedule *B*. Act X. of 1862, General Exemptions.)

SECTION 289.

Wrongful acts or irregularities in executing decree to be punished by Court applied to.

The Court to which such application is made or referred for execution as aforesaid, shall take cognisance of and punish all wrongful acts or irregularities done or committed in executing such decree; and all persons disobeying or obstructing the execution of such decree shall be punishable by such Court in the same manner as if the decree had been made by such Court.

SECTION 290.

Court applied to may in certain cases stay execution, &c.

The Court to which such application is made may, upon good and sufficient cause being shown, stay the execution of the decree for a reasonable time, to enable the defendant to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or the execution thereof, which such Court of first instance or Court of appeal might have made if execution had been issued by such Court of first instance, or if application for execution had been made to such Court; and in case the property or person of the defendant shall have been seized under an execution, the Court which issued the execution may order the restitution of the property, or the discharge of the person of the defendant, pending the result of such application.

SECTION 291.

Before staying execution, Court may require security from, or impose conditions upon, defendant.

Before making an order to stay execution, or for the restitution of property, or the discharge of the defendant, under the last preceding Section, the Court may require such security from, or impose such conditions upon, the defendant, as it may deem reasonable.

For instance, *A* holds a decree of the Hooghly Court against *B*, which is referred to the Nuddea Court for execution. *B* may apply to the Nuddea Court to stay execution for a reasonable time, to enable him to apply to the Hooghly

Court, or, if the case be pending in appeal, to the Appellate Court, for an order to set aside execution on the plea of having a cross decree against *A*, or on the plea of satisfaction. The Court may, on *primâ facie* grounds shown, stay execution, allow time to the defendant, or discharge him with or without security, as it may deem proper.

SECTION 292.

Order of Court passing decree or of Appellate Court to be binding upon Court applied to.

Any order of the Court in which the decree was passed, or of such Court of Appeal as aforesaid, shall be binding upon the Court to which the application for execution was made, and shall be a sufficient indemnity for all persons acting in execution of process issued by such last-mentioned Court.

An order of the Court passing the decree, or of the Court to which its decrees are appealable, to the Court executing the decree, would be a sufficient guarantee to the latter Court and its officers in executing all processes according to such order.

SECTION 293.

Liability of defendant discharged, to be retaken.

No discharge of a defendant under the provisions of Section 290 shall prevent him from being retaken in execution of the decree.

SECTION 294.

What appeal from orders for execution under this Act.

All orders of a Court for execution of a decree of another Court shall be subject to the same rules, in respect to appeal, as if the decree had been originally passed by the Court making such order.

SECTION 295.

Warrant of arrest or other process in execution of decrees, how to be enforced in military cantonments, &c.

If, in execution of a decree, a warrant of arrest or other process is to be enforced within the limits of a garrison, cantonment, military station, or military bazar, the officer entrusted with the execution of such warrant or other process shall carry the same to the commanding officer, or in his absence to the senior officer actually present in the garrison, cantonment, station, or military bazar; and the commanding officer or such senior officer, upon such warrant or other process being produced to him, shall back the same with his signature, and, in the case of a warrant of arrest, shall cause the person named in the warrant to be arrested, if within the limits of his command, and delivered, according to the exigency of the warrant, to the civil officer charged with the execution thereof.

SECTION 296.

Rules contained in this Chapter to be applicable to all civil process for sale of property, &c.

The rules contained in this Chapter shall be applicable to the execution of any judicial process for the sale of property, or for the payment of money which may be ordered by a Civil Court in any civil proceeding.

The rules contained under this Chapter, relating to execution of decrees, will be applicable to all other judicial proceedings, besides a regular suit in which an order for sale of property or payment of money is made. The Chapter refers to the execution of interlocutory orders, to orders in summary suits which are judicial in their nature, and to judicial proceedings generally under any law in force.

CHAPTER V.

OF PAUPER SUITS.

SECTION 297.

A suit may be brought *in formâ pauperis* in the Court having jurisdiction over the claim, subject to the following rules.*

Suits may be brought *in formâ pauperis.*

The procedure in regard to the institution of pauper suits remains very much the same as before. The investigation into the reasonable ground of action required by Act IX. of 1839, is re-enacted in Section 304. The only material alteration is, that there is no appeal from an order either admitting or rejecting a pauper application.

The Madras Sudder Court held, on the 19th March and 16th April 1860, that sudder ameens and district moonsiffs are competent to receive and try pauper suits, without reference by the Civil Judge, where the value of the matter in dispute is within their jurisdiction.

SECTION 298.

No pauper suit shall be brought for the recovery of any sum of money on account of damages for loss of caste, slander, abusive language, or assault.†

What suits excepted.

* The subject of this chapter might have been incorporated with, or immediately followed, the preliminary rules, Chapter II.

The rules regarding pauper suits are not more distinguished for liberality than those regarding insolvent debtors. The subject was entirely overlooked in the Code prepared by the Royal Commissioners.

† It is the policy of the law to discourage "trifling and malicious actions," *i. e.* those founded on inconsiderable provocation and not on any substantial injury, to which class may be referred suits of the kind here enumerated. "Assault," it is to be observed, implies an offer to do bodily harm, but not actual violence.

SECTION 299.

Application to be by petition on stampt paper.

The application to the Court for permission to sue *in formâ pauperis* shall be by petition, which shall be written on a stampt paper of the value of eight annas.*

If one stamp do not suffice, every additional sheet must be of a corresponding value.

SECTION 300.

Petition what to contain.

The petition shall contain the particulars required by Section 26 of this Act, in regard to plaints, and shall have annexed to it a schedule of any movable or immovable property belonging to the petitioner, with the estimated value thereof, and shall be subscribed and verified in the manner hereinbefore prescribed for the subscription and verification of plaints.

The petition is to be subscribed and verified as prescribed in Section 27. The movable and immovable property in possession of the petitioner is to be inserted in the schedule.

The procedure of the English law, which requires the party to depose that he is not possessed of property exceeding a certain sum, (£.5,) exclusive of his wearing apparel and the matter involved in the cause, is more judicious than that prescribed in Sections 300—306, which involves useless specifications and fruitless as well as tedious investigations.

SECTION 301.

How to be presented.

If petitioner be sick or a female.

The petition shall be presented to the Court by the petitioner in person; but if the petitioner satisfy the Court that he is prevented by sickness from attending the Court in person, or if the petitioner be a female who, according to the custom and manners of the country, ought not to be compelled to appear in public, the petition may be presented by a duly authorised agent, who may be able to answer all material questions relating to the application, and who shall be liable to be examined, in the same manner as the party represented by him might have been examined had such party attended in person.

The exception under this Section does not extend to persons of rank.

Held by the Bombay Sudder Court, 28th June 1860, that the power of attorney alluded to in this Section cannot be received on unstampt paper, since, until the applicant is admitted to sue as a pauper, he is not relieved of any charge, except so far as Section 299 relieves him.

* To require that this initial petition *in formâ pauperis* shall be on a stamp is no great hardship; but it appears, from the construction given under Section 305, that there are other expenses to be incurred, not very compatible with pauperism not to mention Counsel's fees.

SECTION 302.

Petition to be rejected if not in form.

If the petition be not framed or presented in the manner laid down in the last two preceding Sections, the Court shall reject the petition.

An appeal is not allowed from orders passed under this Section. But when a petition is rejected on grounds of informality, a fresh petition may be presented.

SECTION 303.

If in form, Court how to proceed.

If presented by an agent, Court may order petitioner to be examined in like manner as an absent witness.

If the petition be in form and duly presented, the Court shall proceed to examine the petitioner, or the agent of the petitioner, as the case may be, regarding the merits of the claim and the property of the petitioner. When the petition is presented by an agent, the Court may also, if it think proper, order that the petitioner be examined in the manner hereinbefore prescribed for the examination of absent witnesses.*

The Court may also examine the plaintiff by commission, as in the case of an absent witness under Section 175.

SECTION 304.

When Court may reject the application.

If it appear to the Court upon such examination that the defendant or the matter of the suit is not within the jurisdiction of the Court; or that the claim is barred by the statute of limitations; or that the allegations of the petitioner do not constitute a reasonable ground of action; or, if none of the objections above stated exist, that the petitioner has failed to show that he is not possessed of sufficient means to enable him to pay for the stamps required for the institution and prosecution of the suit; or that the petitioner recently disposed of any property fraudulently, or with a view to obtain the benefit of this Chapter; the Court shall refuse to allow the petitioner to sue as a pauper.†

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* "Merits of the claim."

The rules in this chapter, as already observed, have been copied from the old law; but care has not been taken to adapt them to the system introduced by this Code. The preliminary inquiry, directed by this and the following Section, so far as regards the "merits of the claim," are embraced in Sections 30, 32, and 33 of this Code, and may be, as remarked by the Royal Commissioners, "easily accounted for by the dilatory character of regular suits, which under the (former) procedure, might have been protracted for a considerable time." But under this Code, which in every case implies an examination of the plaintiff or his agent, on presentation of the plaint, any such preliminary examination is a work of supererogation, or at least may be considered to be merged in that prescribed by the above-mentioned Sections.

† The inquiry as to *pauperism*, seems to be unnecessarily formal and dilatory. It is presumable, considering the insignificance of the benefit held out to a pauper plaintiff, that nobody possessed of means will plead pauperism. The notice to the opposite party looks like an invitation to gratuitous contention.

"*Not* possessed of such means." The applicant is here clearly but illogically called upon to *prove a negative*. He cannot make good his assertion except by *affidavit*, as required by the English law. It is for any party interested, to prove the affirmative, by pointing out that the applicant has some property which he has concealed or made *benamee*.

The inquiry contemplated by the Section being *ex-parte*, it is expected that the petitioner will satisfy the Court, that he has a reasonable ground of action over which the Court has jurisdiction, and that it is not barred by the rules of limitation. This does not prevent the opposite party from appearing of his own accord and showing cause to the contrary.

"Stamps," and vakeels' fees are the most considerable items of the expense of a suit, to be incurred at the outset, but are exclusive of the many other items that must be provided for, before commencing an action in any Court, especially in this country, where every ministerial officer of a Court expects a *douceur* on every occasion. How the Legislature should have taken so narrow a view of the pauper's situation, is inconceivable.

"Fraudulently." It is presumable, from the application to sue *in formâ pauperis*, that the applicant is not in good circumstances. Hence, no sale of property, at a date more or less remote from that of such application, can with propriety be termed "fraudulent."

SECTION 305.

Notice to opposite party.

If upon such examination the Court shall see no reason to refuse the application on any of the grounds stated in the last preceding Section, it shall fix a day (of which at least ten days' previous notice shall be given to the opposite party) for receiving such evidence as the petitioner may adduce in proof of his pauperism, and for hearing any evidence which the opposite party may bring forward in disproof of the pauperism of the petitioner.

The opposite party is to be cited when the pauperism of the petitioner is to be inquired into, and ten days' notice will be given him to produce any evidence he may have in disproof of the alleged pauperism. It is not, however, intended by this Section to preclude the opposite party absolutely from showing that the Court is wrong in entertaining the application, on any of the grounds mentioned in Section 304.

Held by the Bombay Sudder Court, 28th June 1860, with reference to this and the following Section, that summonses to witnesses required by a pauper, cannot be issued and served until he shall have paid into Court the cost of such service, together with the sum required for the traveling expenses and subsistence of the witnesses.

SECTION 306.

After a summary inquiry, the Court to pass a final order.

On the day appointed for the hearing, or as soon after as the business of the Court will permit, the Court shall consider any objections made by the opposite party, and shall examine any witnesses produced by either party, and make a memorandum of the substance of their evidence, and shall either allow or refuse to allow the petitioner to sue as a pauper.

SECTION 307.

Court may direct a local inquiry.

Previously to passing a final order in the case, the Court may, if it deem fit, institute a local inquiry, in the manner laid down in Section 180 of this Act, regarding the property of the petitioner or regarding the amount or value of any property claimed.*

SECTION 308.

Course of proceeding to be observed, if application be admitted.

If the application of the petitioner be granted, it shall be numbered and registered, and shall be deemed the plaint in the suit; and the suit shall proceed in all other respects as an ordinary suit, except that the plaintiff shall not be liable to any further stamp duty in respect of any petition, appointment of a pleader, or other proceeding connected with the suit, or with the execution of any decree passed in it †

By Section 2, Act XIX. of 1839, the defendant also could file petitions and exhibits on unstampt paper. By this Code the defendant will have to file his pleadings, &c., on stampt paper, where stamps are required by law.

The plaintiff has to make his own arrangement in regard to fees of pleaders and sundry other costs.

SECTION 309.

On the decision of the suit, cost of stamps to be realised from party cast.

On the decision of the suit, the Court shall calculate the amount of stamps, which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; and such amount shall be recoverable by Government from any party ordered by the decree to pay the same, in the same manner as costs of suit are recoverable.

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* This is the climax of the impediments thrown in the way of a pauper, seeking to recover a right withheld by an opponent, who may be capable of buying over the officer charged with this local inquiry. Probably the applicant will be liable for the costs of this local inquiry, on the principle of the ruling under Section 305.

† The applicant, after passing through the several ordeals he has been subjected to, under these rules, gets the trifling benefit of being exempt from "any further stamp duty." Under the English law, on merely making an affidavit to the effect stated in the note to Section 300, accompanied with a certificate of counsel that he has good cause of action, he has counsel assigned him for conducting his suit—a matter of the last importance to him.

SECTION 310.

Refusal to be allowed to sue as a pauper, to bar any subsequent application of the like nature.

The refusal to allow the petitioner to sue as a pauper shall be a bar to any subsequent application of the like nature in respect of the same cause of action; but the plaintiff shall be at liberty to institute a suit in the usual manner,* in respect of such cause of action, unless precluded by the rules for the limitation of suits.

SECTION 311.

No appeal from orders under this Chapter.

The orders passed by the Court under the provisions of this Chapter† shall not be subject to appeal.

CHAPTER VI.

REFERENCE TO ARBITRATION.

SECTION 312.

Reference to arbitration on application of the parties.

If the parties to a suit are desirous that the matters in difference between them in the suit,‡ or any of such matters, shall be referred to the final decision of one or more arbitrator or arbitrators, they may apply to the Court at any time before final judgment for an order of reference.

This Chapter re-enacts many of the provisions of Regulation XVI. of 1793 and VI. of 1813, of the Bengal Code, with improvements, of which the principal are:

1. It provides against an award being set aside on the ground of its being made beyond time, although perfect and complete in other respects.—Section 318.

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* "A suit in the usual manner," implies liberty to institute a suit on payment of stamp duty,—which is granting a *nullity* to a party whose poverty is *unquestioned*.

† These are referred to in Section 303 as of two kinds, regarding (1.) "the merits of the claim, and (2.) the (want of) property of the petitioner." On the second point, the *pauperism*, the Court of first instance may *err* or act *arbitrarily*. Hence there is no reason why an appeal from its order should not be admissible. On the contrary, considering the disadvantages of the situation of the applicant, every indulgence ought to be shown to him. The State should make his case its own.

As to the first point, the alleged *merits of the claim*, an *affidavit* as to his pauperism ought to place him in the situation of every other plaintiff, under Sections 30, 32, and 33, and the rejection of *his* plaint should be as much open to appeal as that of any other person whatsoever, under Section 36.

‡ A dispute may be referred to arbitration either when there is a suit pending between the parties relating thereto, or when there is no such suit. This Chapter embraces three classes of cases referred to arbitration, first, when the parties to a suit may consider the subjects in dispute likely to be better arranged by arbitrators than decided by the judge of the Court, according to technical rules, (Sections 312 to 325;) second, where persons may not have commenced a suit and may desire the dispute to be referred to arbitration, (Section 326,) to encourage which course, the stamp of plaint is to be a *quarter* of that ordinarily required for suits; and third, where parties have privately referred their disputes to arbitration, and an award has been made which is brought into Court, within six months from the date thereof, to be enforced, on payment of a stamp for a miscellaneous petition. The reference to arbitration is in every instance voluntary and not compulsory.

2. It gives power to the Court to appoint another arbitrator, or umpire, in case of the death, refusal, or incapacity to act of the arbitrators or umpire first appointed, and in certain other cases.—Section 319.

3. It contains a new and useful provision, whereby arbitrators will be able to submit the award in the form of a special case, where it is not otherwise provided for in the agreement, for the opinion of the Court.—Section 321.

4. It enables the Court to correct or amend such redundancies and mistakes in form, or incident errors in the award, as may be done without affecting the merits of the award.—Section 322.

5. It empowers the Court to decide the question of costs of arbitration, where the award contains no provision on the point.—*Ibid.*

6. It enables the Court to remand awards to the arbitrators for re-consideration, on the grounds mentioned in Section 323.

These provisions will greatly facilitate the decision of cases referred to arbitration, and prevent the awards being set aside on purely technical grounds, which is often attempted by the unsuccessful party.

"Matters in difference* between them in the suit," that

* "Matters in difference." The importance of settling what are "the points to be decided," or, technically, "the issues," even in cases that come before experienced judges, being acknowledged, it must excite surprise that when, in the course of a suit, arbitration is resorted to, the points in dispute should not be drawn up in form, with the aid or approval of the Court, previous to their being submitted to the arbitrators, who have not had similar experience in judicial matters. The language here used is either "the matters in difference in the suit," or "the matters referred to arbitration;" while the allusion to the examination of parties and witnesses, (Section 317,) manifests that the suit itself is transferred, for trial and decision, to the arbitrators, whose proceedings cannot but require revision (Section 322) or re-consideration (Section 323).

It would probably be an improvement on the present practice, which leaves the subject of arbitration quite indeterminate, to resort to the method recognised in Sections 142 and 143. The parties may be required to state "the questions of fact or law to be decided between them in the form of issues." The former would be referred to arbitrators, in the method provided for in this chapter, whose finding, after hearing such evidence as they may require or as may be offered to them, should not be liable to be questioned, "except on the ground of corruption or misconduct." The latter would be decided by the Court, after hearing counsel on both sides if the parties prefer it, and subject to appeal, "unless the parties agree to the contrary."

There is no mention in the Sections relating to "Issues by Agreement of Parties" and "Proceedings on Agreement of Parties," that the judgment is to be given "after hearing the parties, their advocates, or vakeels," as there was in the first draft of the Code regarding "special cases for the opinion of the Court," and is in the rules of Sections 372 *a—i* of this Code, corresponding with Sections 27—35, Act XXIII. of 1861, (and Sections 13—19, Act XLII. of 1860, regarding the Mofussil Small Cause Courts,) relative to taking the opinion of the High Court in cases where special or (in the case of the Mofussil Small Cause Courts) regular appeals are not allowable. Such a rule may be understood, but should have been expressed.

is, all matters in dispute between parties, whether relating to movable or immovable property, or damages *et cætera*.

SECTION 313.

Application how to be made.

The application shall be made by the parties in person, or by their pleaders specially authorised in that behalf by an instrument in writing, which shall be presented to the Court at the time of making the application, and shall be filed with the proceedings in the suit.

"Parties in person" includes their recognised agents.

SECTION 314.

Appointment of arbitrators by the parties or the Court.

The arbitrator or arbitrators shall be nominated by the parties in such manner as may be agreed upon between them. If the parties cannot agree with respect to the nomination of the arbitrator or arbitrators, or if the person or persons nominated by them shall refuse to accept the arbitration, and the parties are desirous that the nomination shall be made by the Court, the Court shall appoint the arbitrator or arbitrators.

The nomination of arbitrators will ordinarily be made by the parties to the suit, and by the Court on their application only on the occasions mentioned in this Section.

SECTION 315.

Order of reference and time of award.

The Court shall, by an order under its seal, refer to the arbitrator or arbitrators the matters in difference in the suit which he or they may be required to determine, and shall fix such time as it may think reasonable for the delivery of the award, and the time so fixed shall be specified in the order.

SECTION 316.

When the reference is to two or more, an umpire is to be appointed, &c.

If the reference be to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators, by the appointment of an umpire, or by declaring that the decision shall be with the majority, or by empowering the arbitrators to appoint an umpire, or otherwise, as may be agreed upon between the parties, or, if they cannot agree, as the Court may determine.

After the arbitrator or arbitrators have been appointed by the parties or the Court as under Section 314, the provision in case of a difference of opinion is to be made by the parties if they agree. If they cannot agree, the Court may determine, whether moved by the parties or not.

SECTION 317.

When a reference is made to arbitration by an order of Court, the Court shall issue the same processes to the parties and witnesses whom the arbitrator or arbitrators or umpire may desire to have examined, as the Court is authorised to issue in suits tried before it; and persons not attending in consequence of such process, or making any other default, or refusing to give their testimony, or being guilty of any contempt to the arbitrator or arbitrators or umpire during the investigation of the suit, shall be subject to the like disadvantages, penalties, and punishments, by order of the Court on the representation of the arbitrator or arbitrators or umpire, as they would incur for the same offences in suits tried before the Court.

Summoning witnesses.

Punishment of contempts, &c.

In other words, the arbitrators will exercise all the powers which the Court could exercise if the case had been tried by it, the difference being that the Court will act on the representation of the arbitrators. Where an application is made by the arbitrators to enforce an order objected to by the parties affected by it, it will of course be in the discretion of the Court to authorise or prevent its enforcement, as may appear proper.

"By an order of Court," *i. e.* not a private arbitration under Section 326.

"Persons not attending." Compare this clause with the like clause in Section 180, regarding neglect to appear before a commissioner deputed to make a local investigation, and the High Court's ruling thereon.

SECTION 318.

When the arbitrator or arbitrators shall not have been able to complete the award within the period specified in the order, from the want of the necessary evidence or information or other good and sufficient cause, the Court may, from time to time, enlarge the period for the delivery of the award, if it shall think proper. In any case in which an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators, if they shall have allowed their time or their extended time to expire without making an award, or shall have delivered to the Court, or to the umpire, a notice in writing, stating that they cannot agree. Provided that an award shall not be liable to be set aside only by reason of its not having been completed within the period allowed by the Court, unless on proof that the delay in completing the award arose from corruption or misconduct of the arbitrator or arbitrators or umpire, or unless the award shall have been made after the issue of an order by the Court superseding the arbitration and recalling the suit.

Extension of time for making award.

Umpire when to act.

Award not to be set aside for delay, but only as provided.

"Corruption or misconduct," referred to here and in Section 324. The former term implies that the arbitrators are influenced, by reward or other improper motive, in giving an unjust award. The latter, that the proceedings have not been correct and proper, and have led to an erroneous conclusion. Among these improprieties are reckoned proceeding to arbitrate without giving notice of their meeting, or refusing to postpone the hearing, or declining to receive pertinent evidence, or committing any other gross impropriety in practice.

A point of great importance is not noticed in this Chapter,—the arbitrators being misled by gross fraud used by either of the parties, such as a managing partner of a business producing false books of accounts as genuine.

SECTION 319.

In case of death, incapacity, or refusal to act as arbitrators or umpire, Court may appoint others instead.

If, in any case of reference to arbitration by an order of Court, the arbitrator or arbitrators or umpire shall die, or refuse or become incapable to act, it shall be lawful for the Court to appoint a new arbitrator or arbitrators or umpire, in the place of the person or persons so dying, or refusing or becoming incapable to act. Where the arbitrators are empowered by the terms of the order of reference to appoint an umpire, and do not appoint an umpire, any of the parties may serve the arbitrators with a written notice to appoint an umpire; and if within seven days after such notice shall have been served, no umpire be appointed, it shall be lawful for the Court, upon the application of the party having served such notice as aforesaid, and upon proof to its satisfaction of such notice having been served, to appoint an umpire. In any case of appointment under this Section, the arbitrator or arbitrators or umpire so appointed shall have the like power to act in the reference, as if their name or names had been inserted in the original order of reference.

SECTION 320.

Award under signature to be submitted with all the papers.

When an award in a suit shall be made either by the arbitrator or arbitrators, or by the umpire, it shall be submitted to the Court under the signature of the person or persons by whom it may be made, together with all the proceedings, depositions, and exhibits in the suit.

SECTION 321.

Arbitrator may state special case.

It shall be lawful for the arbitrator or arbitrators or umpire, upon any reference by an order of Court, if he or they shall think fit, and if it is not provided to the contrary, to state his or their award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court.

For instance, when a case is referred to arbitration, in which the validity of an adoption on questions of fact and

law is involved, the arbitrators may determine all the issues of fact and submit their award for the opinion of the Court on the legal point.

SECTION 322.

Court may, on application, modify or correct an award in certain cases.

The Court may, on the application of either party, modify or correct an award, where it appears that a part of the award is upon matters not referred to the arbitrators, provided such part can be separated from the other part, and does not affect the decision on the matter referred; or where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision. The Court may also, on such application, make such order as it thinks just respecting the costs of the arbitration, if any question arise respecting such costs, and the award contain no sufficient provision concerning them.

And make order respecting the costs of arbitration.

On receiving the award, the Court, if moved by either party, is authorised to strike out of it any thing of an extraneous nature, or beyond what the arbitrators were required to decide, if it be distinct from the rest of the award. It can also rectify any defect in the tenor of the award, or any error that does not run through it, that might prevent its being completely carried into effect. If the award appear unobjectionable* in these respects, it is to adopted, to form the ground of the "judgment" to be passed under Section 325.

The time within which application is to be made for the amendment of the award is not stated. But see Section 324.

SECTION 323.

In what cases Court may remit the award, or any of the matters referred to arbitration, for re-consideration.

In any of the following cases the Court shall have power to remit the award, or any of the matters referred to arbitration, to the re-consideration of the same arbitrator or arbitrators or umpire, upon such terms as it may think proper, (that is to say)—

If the award has left undetermined some of the matters referred to arbitration, or if it determine matters not referred to arbitration;

If the award is so indefinite as to be incapable of execution;

If an objection to the legality of the award is apparent upon the face of the award.

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* As the view which may be taken by the Court and the amendments made in the award in consequence, may be objected to by one of the parties, this will be a ground of appeal or review, as may be considered advisable. The provisions of this Section are embraced by, and more clearly and amply expressed in the following Section, which is one of those suggested by the Royal Commissioners from the provisions of the English law.

It is competent to the Court, (there is no mention of any application being made to it,) to return the award to the arbitrators to be reconsidered by them on the grounds here specified. These grounds are the same with those stated in the preceding Section, with the exception of matters referred but "left undetermined," a very material point. All the points except the last may be "corrected;" but obviously the preferable course would be to send back the award for revision by the arbitrators, as it would afford them an opportunity of explaining themselves, and of justifying their decision if they saw fit to adhere to it. The rules of these two Sections may advantageously be amalgamated and more lucidly stated.

Vide remarks on Section 312.

"Upon such terms as it may think proper," *i. e.* as to payment of costs, the time of making the award, *et cætera.*

If, after an award is made, some of the arbitrators die, or become incapable of acting, the case cannot be remanded to other arbitrators. The award should be set aside and the case referred to arbitration *de novo.*

SECTION 324.

No award shall be liable to be set aside except on the ground of corruption or misconduct of the arbitrators or umpire. Any application to set aside an award shall be made within ten days after the same has been submitted to the Court.*

Award not to be set aside except for corruption or misconduct, on application made within ten days.

It will be seen that the word "misconduct" has been introduced in this Code to indicate one of the grounds for setting aside the award, where the word "partiality" stood in the Regulations. The latter was too vague and indeterminate, and rested more upon inference than direct proof. This Section evidently means misconduct which admits of direct proof, and by which the rights of parties may be injuriously affected.

SECTION 325.

If the Court shall not see cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and if no application shall have been made to set aside the award, or if the Court shall

Judgment to be according to the award.

* Though arbitration is not much in favour, because of the liability of arbitrators to entertain a partiality or prepossession in favor of one side, yet, when resorted to, the parties should not be allowed to charge the arbitrators with "corruption." If corruption can be proved, the person convicted of it should be liable to punishment, as a judge would be; and if such a charge be brought wantonly, failure to establish it should not be passed over.

have refused such application, the Court shall proceed to pass judgment according to the award, or according to its own opinion on the special case, if the award shall have been submitted to it in the form of a special case; and upon the judgment which shall be so given, decree shall follow and shall be carried into execution in the same manner as other decrees of the Court. In every case in which judgment shall be given according to the award, the judgment shall be final.*

SECTION 326.

Agreement of parties to refer to arbitration may be filed in the Court.

When any persons shall by an instrument in writing agree that any differences between them, or any of them, shall be referred to the arbitration of any person or persons named in the agreement, or to be appointed by any Court having jurisdiction in the matter to which it relates, application may be made by the parties thereto or any of them that the agreement be filed in such Court. On such application being made, the Court shall direct such notice to be given to any of the parties to the agreement, other than the applicants, as it may think necessary, requiring such parties to show cause, within a time to be specified, why the agreement should not be filed. The application shall be written on a stampt paper of one-fourth of the value prescribed for plaints in suits, and shall be numbered and registered as a suit between some or one of the parties, interested or claiming to be interested, as plaintiffs or plaintiff, and the others or other of them as defendants or defendant, if the application have been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the agreement, the agreement shall be filed and an order of reference to arbitration shall be made thereon. The several provisions of this Chapter, so far as they are not inconsistent with the terms of any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court and to the award of arbitration and to the enforcement of such award.†

Provisions of this Chapter applicable.

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* Arbitration differs from trial by jury, in not requiring the interference of the Court except on special occasions, (Section 322 and 323). "It is a great principle of law that the decision of a jury, upon an issue of fact, is in general irreversible and conclusive." There are, however, several grounds for a new trial, such as misdirection of the jury by the judge or the judge's admitting or refusing evidence contrary to law, the verdict's being contrary to the evidence, or contrary to the weight of the evidence and disapproved by the judge, whereby the finding is manifestly wrong. Now as an award may be chiefly on a point of law on which the dictum of the judge may be wrong, or the judge may have improperly corrected or remitted it for reconsideration, or improperly refused to set it aside, is there not manifestly need of an appeal to a higher Court? Certainly, the decision of a judge on a point of a law, referred to him by arbitrators in the form of a special case, is not less liable to appeal than if it had been pronounced by him in a contested suit. In fact there is a reason why it should be, namely, that, in the latter case, he must have had the advantage of hearing the matter argued before him by counsel.

† As already noticed, reference to arbitration under this Chapter is voluntary. But it is a principle that all mercantile disputes and differences between parties should be settled by that means of adjudication, as the best adapted for such cases. The appointment of a Commissioner under Section 181, is perhaps considered a substitute for it; but it was not regarded in that light by the Royal Commissioners. It does not provide for the disposal of the dispute, but is only preparatory to the Court's passing an "ultimate judgment" on it, and therefore cannot relieve the Court of the labour of investigating it as arbitration is in general calculated to do, if the parties have no material cause of dissatisfaction with the proceedings of the arbitrators.

This Section refers to private arbitration of any matters in dispute, regarding which no suit has been preferred in any Court.* This is a provision unknown to the Regulation law. Parties may agree to an arbitration and file the agreement in Court, when it is to be converted into a suit between them, and the Court will act upon it in the same manner as if the reference to arbitration had been made in a pending suit. Notices will be given to all parties, as a summons is issued to a defendant. It is expected that, before acting upon the agreement, the Court will satisfy itself that the notices were duly served. Orders passed under this Chapter are not open to appeal.†

SECTION 327.

Filing in Court an award, when the matter was referred to arbitration without intervention of Court.

When any matter has been referred to arbitration without the intervention of any Court of justice, and an award has been made, any person interested in the award may, within six months from the date of the award, make application to the Court having jurisdiction in the matter to which the award relates, that the award be filed in Court. The Court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring such parties to show cause, within a time to be specified, why the award should not be filed. The application shall be written on the stampt paper required for petitions to the

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* The power of either party, dissatisfied with the award, to apply to the Court to modify or correct it under Section 322, and that of the Court to remit it to the reconsideration of the arbitrators under Section 323, may be exercised with regard to private awards, if consistent with the terms of the agreement. The parties may agree to bind themselves, however erroneous the award may be as to the merits of the case; but they cannot do so when there is an obvious error as to law. The judges cannot consent to a violation of the law even upon the agreement of the parties, just as they cannot sanction an illegal contract.

† This opinion refers to the expression in the preceding Section—"the judgment shall be final," that is, as expressed in the original, between the parties, implying that, with the judgment given on the award, the proceedings, as regards the arbitration, shall come to an end. Nor must we be misled by the practice of the English Courts, *viz.* that "in a case referred to arbitration, where an action is pending, the parties consent that a verdict shall be given for the plaintiff for the damages laid in the declaration, (*i. e.* the plaint,) subject to the award of the arbitrators," there being no analogy between it and the practice of the Mofussil Courts either under the Regulations or this Code. That a judgment on a special case (Section 142) is not open to appeal, is owing to a technical cause—its not being "entered on record." But "error may be brought upon a judgment on a special case, in the same manner as upon a judgment on a special verdict, unless the parties agree to the contrary." An award, however, differs from a judgment on a special case, in the respects abovementioned.

Were the matter in contest referred to arbitration on an engagement, that the award on matters of fact should not be impugned except on the ground of corruption or misconduct, (Section 324,) and were no point of law involved therein, the award could not but be deemed conclusive. It must be otherwise when it involves accessories of the descriptions adverted to.

Court, where a stamp is required for petitions by any law for the time being in force, and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the award,* the award shall be filed and be enforced as an award made under the provisions of this Chapter.

Enforcement of such award.

This is a re-enactment of Section 3, Regulation VI. of 1813, of the Bengal Code, and an extension of its provisions to movable, and every description of immovable, property.

The Calcutta Sudder Court direct, in their Circular of the 14th April 1860, that an application to give effect to a private award should be made to the Court having jurisdiction with reference to value, and should be brought on the file as a regular suit, but that it should be on a stamp of the value required for miscellaneous petitions. The Madras Sudder Court adopted this ruling, 1st October 1860.

"The award shall be filed and may be enforced." It was decided by the Agra Sudder Court, 7th January 1860, that an order admitting an award, with a view to its enforcement, is appealable.

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* The remarks in the foregoing note are applicable also to the awards contemplated in this Section.

It is not stated, as in the preceding Section, that the provisions of this Chapter shall be applicable to awards which have been made by arbitrators appointed without the intervention of the Court. It is, however, to be understood, that the Court cannot enforce an exceptionable award, that is, if it be *illegal*,—contrary to some express rule of law; or *fraudulent*, without grounds, or calculated to deprive a third party of some right; or *unjust*, repugnant to some principle of natural justice, or even liable to some of the objections adverted to in Section 323. It is not many years since that deeds, by which parties were sold into slavery, and for the most immoral purposes, were formally, and as matters of course, registered by native judicial officers of rank. It would not be at all surprising were awards of a like nature entered as "suits," to be *enforced* under this Section, unless it be obligatory on the judges to examine them (including those filed under the preceding Section,) in the same manner as they are required, by Sections 27 to 33, to scrutinize plaints to determine their admissibility.

CHAPTER VII.

OF PROCEEDINGS ON AGREEMENT OF PARTIES.

How Questions may be raised for the Decision of a Civil Court by any Persons interested.

SECTION 328.

Questions of fact, or of law, may be raised by agreement for the decision of any Court having jurisdiction.

Parties interested, or claiming to be interested, in the decision of any question of fact or law, may enter into an agreement, which shall be subject to the same stamp duty as prescribed for plaints in suits, that, upon the finding of a Court in the affirmative or negative of such question of fact or law, a sum of money fixed by the parties, or to be determined by the Court shall be paid by one of the parties to the other of them; or that some property, movable or immovable, specified in the agreement, shall be delivered by one of the parties to the other of them, or that one or more of the parties shall do or perform some particular legal act, or shall refrain from doing or performing some particular act specified in the agreement. Where the agreement is for the delivery of some property movable or immovable, or for the doing or performing or the refraining to do or perform any particular act, the estimated value of the property to be delivered, or to which the act specified may have reference, shall be stated in the agreement.

The rules in this Section are analogous to those contained in Section 142, which applies to pending suits. This Section enables parties, without any suit in Court, to submit their contention in the form of a special case for the decision of the Court. Judgments passed under this Chapter, being by consent of parties, are not appealable. *Vide* remarks on Section 142.

SECTION 329.

Agreement to be filed and numbered as a suit.

The agreement may be filed in any Court having jurisdiction in the matter, and, when so filed, shall be numbered and registered as a suit between some or one of the parties interested or claiming to be interested as plaintiffs or plaintiff, and the others or other of them as defendants or defendant; and notice shall be given to all the parties to the agreement other than the party or parties by whom it was presented.

SECTION 330.

Parties to be subject to the Court's jurisdiction.

After the agreement shall have been filed, all the parties to it shall be subject to the jurisdiction of the Court, and shall be bound by the statements contained therein.

SECTION 331.

Hearing and disposal of the case.

The case shall be set down for hearing as an ordinary suit; and if the Court shall be satisfied, after an examination of the parties or their pleaders, or taking such evidence as it may deem proper, that the agreement was duly executed by the parties, and that they have a *bonâ fide* interest in the question of fact or law stated therein, and that the same is fit to be tried or decided, it shall proceed to record and try or hear the same, and deliver its finding or opinion thereon, in the same way as in an ordinary suit, and shall, upon its finding or deciding upon the question of fact or law, give judgment for the sum fixed by the parties, or so ascertained as aforesaid, or otherwise, according to the terms of the agreement; and upon the judgment which shall be so given, decree shall follow, and may be executed in the same way as if the judgment had been pronounced in a contested suit.

CHAPTER VIII.

OF APPEALS.

SECTION 332.

[Repealed by Section 1, Act XXIII. of 1861, and re-enacted by Section 23 as follows.]

Appeal to lie from all decrees, except when expressly prohibited.

Appeal to Sudder Court to be heard by two or more Judges.

Rule if two judges differ as to facts,—

and as to points of law.

Except when otherwise expressly provided in this or any other Regulation or Act for the time being in force, an appeal shall lie, from the decrees of the Courts of original jurisdiction, to the Courts authorised to hear appeals from the decisions of those Courts. If the appeal lie to the Sudder Court, it shall be heard and determined by a Court, consisting of two or more Judges of that Court.* If, when the Court consist of only two Judges, there is a difference of opinion upon the evidence in cases in which it is competent to the Court to go into the evidence, and one Judge concur in opinion with the Lower Court as to the facts, the case shall be determined accordingly. If, in a Court so constituted, there is a difference of opinion upon a point of law, the Judges shall state the point upon which they differ; and the case shall be re-argued upon that question before one or more of the other Judges, and shall be determined according to the opinion of the majority of the Judges of the Sudder Court by whom the appeal is heard.

The appeals referred to in this Section are regular appeals from the decrees of Courts of original jurisdiction. Under Section 14 of the Charter of the High Court, an appeal lies to it "from the judgment, in all cases of original civil jurisdiction, of one or more Judges or of any Division

* The original Section (332) consisted of these two sentences only, and the second sentence specified "three or more" as a full bench.

Court thereof," unless the decision have been "made by a majority of the full number of Judges," and under Section 15, the High Court is to be "a Court of appeal from the Civil Courts of the Bengal division of this Presidency, and from all other Courts, whether within or without the said Bengal division, from which there was an appeal to the Sudder Court at Calcutta," and to "exercise appellate jurisdiction in such cases (*i. e.* such matters) as were subject to appeal to that Court."

Section 13 of the Act, under which the Charter has been issued, authorises the High Court "by its own rules to provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges thereof, of the original and appellate jurisdiction vested in such Court." Were this discretionary power to be acted on, one Judge would be competent to reverse decisions of the lower Court in original suits and appeals.

The original Section 332 required appeals in the Sudder Court to be "heard by a Court consisting of three or more Judges." The amended Section provides, "with a view to afford relief to the Sudder Court in this Presidency," that such Court shall consist of two or more Judges; and hence the necessity of a rule for determining how appeals are to be disposed of, when the two Judges, who may be expected ordinarily to form the Court of appeal, differ in opinion. It was the rule, under Regulation VI. 1793, that, in such case, the appeals should be re-heard at a sitting of the three Judges of the Court. The rule, as regards the Provincial Courts, was that the senior of the two Judges, should have a casting vote in confirming or reversing the decree when the case was "further appealable to the Sudder Court," but not in reversing it when the decision of the Provincial Court would be final. This rule was rescinded in 1814, and it was ordered that the decision should be "suspended, until the opinion of a third Judge could be taken."

The rule now adopted gives, as it were, a casting vote to the Judge of the lower Court, if the difference of opinion between the Judges of the Court of appeal turn upon questions of fact, but requires points of law to be "re-argued before one or more of the other Judges." The object of having the re-hearing before "one or more of the other Judges" is doubtless to guard against the contingency of the third Judge taking an entirely different view of the point

from his colleagues, so as to necessitate the reference of it to a fourth or even fifth Judge in succession. This was often the case under the system which prevailed in the Sudder Court before the promulgation of Act III. of 1843.

SECTION 332 *a*.

[Section 15, Act XIV. of 1859.*]

If any person shall without his consent have been dispossessed of any immovable property otherwise than by due course of law, such person or any person claiming through him shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof, notwithstanding any other title that may be set up in such suit, provided that the suit be commenced within six months from the time of such dispossession. But nothing in this Section shall bar the person, from whom such possession shall have been so recovered, or any other person, [from] instituting a suit, to establish his title to such property and to recover possession thereof, within the period limited by this Act.†

Person illegally dispossessed of immovable property, may recover possession without proof of title—

By a suit brought within six months.

Suit to establish title not affected hereby.

This Section allows a person, who has been forcibly and illegally dispossessed of immovable property, to sue for it, within six months from the date of ouster, without adducing any proof of his title, but only of that fact. Such suits might formerly have been brought before the Magistrate, under Act IV. of 1840, within one month from date of possession, with right to appeal from his order to the Session Judge.

There has been an impression, founded on the Privy Council's decree, Ramrutton Roy *v.* Furrook-oon-nissa, in 1847,‡ that a person, who sought restitution of lands of which he was forcibly disseised, must prove his title to them. This Section prescribes a different rule. It allows the dis-

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* This Section appears properly to belong to a Code of Procedure, and has therefore been inserted in this place, with the following Section, which prohibits appeals from decrees in suits for dispossession.

† According to Act X. of 1862, Schedule *B.* article 11, "a stamp of one-fourth the value prescribed" in the "scale" therein given, is required for "suits for possession," under this Section. "Repossession" is evidently intended. The party, who sues, on the ground of *title*, for "possession," must use a stamp of the full value.

‡ Their ruling was to this effect:—Claimants to real estate, in possession of a party by order of the Magistrate, (on proof of his having been ousted therefrom by them,) must prove their title before calling upon the party in possession to prove his title. This ruling is exactly in conformity to the provision in Section 332 *a*. In other words, a party who has been in possession of an estate, if ousted by claimants thereto, is required to prove those facts only, to be again put in possession: it is for the claimants, if they wish to set aside the judgment in his favor, to institute a suit to establish their title and the invalidity of any title which he may set up. Hence the importance of the provision here made.

seisor also, to sue, upon proof of his superior title to the lands, at any time within the usual period of limitation. Some directions for the guidance of the Courts are required. Suppose this party to bring his suit simultaneously with the party who complains of ouster: are the two to be considered as cross-suits? And will the former be punished with damages and costs for his illegal act, and in return recover both as being the rightful owner; or will his contempt of the law be passed over on the ground of his right and the dishonesty of his opponent?

SECTION 332 *b*.

[Section 26, Act XXIII. of 1861.]

No appeal from, or review of decision under Section 15, Act XIV. of 1859.

No appeal shall lie from any order or decision passed in any suit instituted under Section 15, Act XIV. of 1859, *(to provide for the limitation of suits,)* nor shall any review of any such order or decision be allowed.

See Act IX. of 1861, (in the Appendix,) regarding appeals to the Sudder Courts, from orders of the lower Courts, relating to minors.

The power of preferring a summary appeal from the Magistrate's order, is withdrawn by this Section. The reason of this is partly, perhaps, that the Civil Courts are better qualified than Magistrates to decide such suits, in which questions of title are involved, which Magistrates often entered into, contrary to the intent of Act IV. of 1840, and to the instructions of the Nizamut Adawlut to them on the point. The improvements in the procedure, effected by this Code, justify the expectation of the speedy decision of suits of this nature. The party, who brings a suit on the allegation of having been illegally dispossessed, may hope to have it tried in a few weeks; and if it be dismissed, he may prefer another on the ground of title, which has every likelihood of being disposed of in the time an appeal may be decided.

In supersession of Act IV. of 1840, the following provisions have been enacted.

1. By Clause 6, Section 23, Act X. 1859, "all suits to *recover* the occupancy or possession of any land, farm, or tenure, from which a ryot, farmer, or tenant has been illegally *ejected* by the person entitled to receive rent for the same," are cognizable exclusively by Collectors, and "not in any other Court, except in the way of appeal." The

Calcutta Nizamut Adawlut, in their Circular of the 10th November 1860, by an oversight of the wording, as given above, say that this clause gives the landholder power to bring a suit to try "the question of *right* to eject." They perhaps allude to clause 5, which refers to "suits to eject a ryot on account of non-payment of arrears of rent." This clause (6) simply provides a remedial measure for the ryot or other tenant, who may be illegally dispossessed by a superior landholder. Not less questionable is the Court's remark, that, "by Clause 6, Section 23, Act X. 1859, such suits are now maintainable as summary suits before a Collector of revenue." The Board of Revenue of the N. W. Provinces appear to have taken, in their Circular of the 3rd August 1859, a correct view of this law, in stating: "The jurisdiction of a Collector's Court, in questions relating to the recovery of rent and the *occupancy* of land, is no longer *summary* and *partial:* it has become *regular* and *exclusive*." The landholder may apply to the Collector, under Section 25, Act X. of 1859, if he require assistance to eject any cultivator not having a right of occupancy; but if he anticipate no resistance, he need make no application of the kind, nor seek to try his "right to eject."

2. Under Section 318 of the Code of Criminal Procedure, the Magistrate may, if there be reason to apprehend a breach of the peace on account of any land, or right connected therewith, inquire into the matter and declare who is the party proved to be in possession, and entitled to hold it until ousted by due course of law. It follows that, if a party have been illegally ousted, the Magistrate has no power to restore the property, but must refer him to his remedy under Section 332 *a* of this Code, (Section 15, Act XIV. of 1859).

How Appeals are to be preferred.

SECTION 333.

Appeal to be preferred by a memorandum to be presented to the Appellate Court within specified time.

Appeals shall be made in the form of a memorandum, which shall be presented in the Appellate Court within the period hereinafter specified, unless the appellant shall show sufficient cause to the satisfaction of the Appellate Court for not having presented it within such limited period; that is to say, within thirty days if the appeal be to a district Court, and within ninety days if the appeal be to the Sudder Court. The days shall be reckoned from and exclusive of the day on which judgment was pronounced, and also exclusive of such time as may be requisite for obtaining a copy of the decree appealed against.

The new rules of practice published by the Sudder Court lay down the details of the procedure in regard to appeals to that Court, and form the best commentary on this and the following Sections. They will apply *cæteris paribus* to appeals to the district Appellate Courts.

The Calcutta Sudder Court, with reference to a doubt expressed, stated, on the 5th October 1859, that appeals are still referrible to Principal Sudder Ameens for trial. That part of Regulation V. of 1831, of the Bengal Code, which relates to this point, has not been repealed.

Held by the Madras Sudder Court, 1st October 1860:

"No extension of the time limited for appealing can be granted, for the purpose of putting in an appeal. Any party, desiring to present an appeal after the expiration of such limited time, is to put in a petition on the usual stamp, explaining the cause of delay and requesting the Court to receive his appeal.

"The time limited for appealing from a decree begins to run from the date on which *judgment was pronounced* and not, as before, from the date of signing and sealing the decree.

"In calculating the time for appealing, the Courts are not to take the corresponding date in the calendar month, but to reckon the *number of days* allowed by the Act.

"If a party present an application for review of judgment within the time limited for appealing from the decree, the period occupied by the Court in disposing of such application will not be reckoned among the number of days limited by the Act for appealing, but will be added thereto; and a memorandum of appeal, presented within such extended period, will be received as put in within time."

"Exclusive of such time," &c.—The last clause of this Section was probably added, in consequence of the Calcutta Sudder Court's having come to a resolution, on the 5th September 1855, on the ground of the absence of any such provision in (the rescinded) Act XVI. of 1853, relating to special appeals, to discontinue the practice, which previously obtained, of excluding, from the calculation of the period allowed for appeal, the time occupied in obtaining copies of the decrees which are to be filed with the appeal.

SECTION 334.

What the memorandum is to contain.

The memorandum of appeal shall set forth concisely, and under distinct heads, the grounds of objection to the decision appealed against, without any argument or narrative, and such grounds shall be numbered consecutively. The appellant shall not without the leave of the Court urge, or be heard in support of, any other ground of objection; but the Court, in deciding the appeal, shall not be confined to the grounds set forth by the appellant.*

The appellant may, with leave of the Court, urge additional grounds of objection. The procedure in this respect is what it was before.

"58. Section 334 directs that the period allowed for appeal shall be reckoned exclusive of the time requisite for obtaining a copy of the decree appealed against. In granting copies of decrees, therefore, the lower Courts will be careful to endorse on them the date of application for copies and the date when such copies were ready for delivery to the appellant. When the requisite stamps are not filed with the petition, the date of application must be considered to be that on which the stamps were filed and the mohurirs were enabled to commence the preparation of the copies. The endorsement therefore must always state on what date the stampt papers were deposited. The Appellate Court should be careful to notice any delay in furnishing these copies."—*S. C. Cir. Or., 29th July* 1859.

SECTION 335.

Form of memorandum, to be accompanied with copy of decree.

The memorandum of appeal shall be in the following form, or to the following effect, and shall be accompanied by a copy of the decree appealed against.

Memorandum of Appeal.

(Name, &c. as in Register.) Plaintiff.
(Name, &c as in Register.) Defendant.

[Name of Appellant] Plaintiff [or Defendant] above-named appeals to the Sudder Court at [or Zillah Court at as the case may be], against the decree of in the above suit, dated the day of ; for the following reasons, namely, [*here state the reasons*].

* In the draft of this Code the Royal Commissioners proposed: "The appellant shall not be tied down to the objections set forth by him in his memorandum of appeal."

This is but reasonable, because the appellant may, after filing the memorandum of appeal, discover strong grounds of objection to the decree. The exclusion of this proposed clause is not consistent with the Court's not being "confined to the grounds set forth by the appellant," with reference to the provision in Section 348, allowing the respondent to state his objections to the decision, without preferring a separate appeal, which gives him some advantage over the appellant. It is a general principle, however, that the course to be taken by the Court should be as well defined as possible; also that suitors should be as little subject to the discretion of the Court.

An example of the grounds of objection is given in the Appendix.

Held by the Madras Sudder Court, 1st October 1860:

"No memorandum of appeal can be received unless it be accompanied, *at the time of presentation*, with an authenticated copy of the decree appealed against.

"The appellant is only required to produce, with his memorandum of appeal, a copy of the *decree* appealed against, and need not produce copy of the *judgment*."

SECTION 336.

If memorandum be not in form or duly presented.

If the memorandum be not drawn up in the manner hereinbefore prescribed, the Court may reject it or may return it to the party for the purpose of being corrected. If the memorandum be not presented within the prescribed period and no sufficient cause be shown for the delay, the appeal shall be rejected.*

The rejection of a memorandum under this Section will not prevent an appellant from again filing his appeal in proper form within time. Under the former law, Act XV. of 1853, the parties had to apply for extension of time before the expiration of the period allowed by law. Under this Code he need not apply for an extension. He may file his appeal beyond time, and show cause for the delay. The Appellate Court will admit such appeal, if satisfied on the point.

The Agra and Madras Sudder Courts have ruled that the memorandum, if it be *rejected*, is of no further use, though an amended memorandum may be filed within the prescribed period. But if it be *returned* for correction, it may be filed again after the necessary amendments have been made in it. In the former case a fresh stamp will be requisite, but not in the latter. The same rule applies to plaints under Section 29.

SECTION 337.

One of several plaintiffs or defendants may appeal and obtain a reversal of the whole decree, if it proceed on a ground common to all.

If there be two or more plaintiffs or two or more defendants in a suit, and the decision of the lower Court proceed on any ground common to all, any one of the plaintiffs or defendants may appeal against the whole decree, and the Appellate Court may reverse or modify the decree in favor of all the plaintiffs or defendants.

* The second sentence is a repetition of the rule in Section 333.

The principle of this Section is already practically, though partially, acted upon by the Civil Courts. This Section legalises the practice.

Of Staying and Executing Decrees under Appeal.

SECTION 338.

Execution of a decree shall not be stayed by reason only of an appeal having been preferred against such decree; but the Appellate Court may, for sufficient cause shown, order that execution be stayed. If application for execution be made before the time allowed for appeal has expired, and the lower Court has not received intimation of an appeal having been preferred, the lower Court, if sufficient cause be shown, may stay the execution. Before making an order to stay execution, the Court making the order shall require security to be given by the party, against whom the decree was passed, for the due performance of the decree or order of the Appellate Court.

Execution of decree not to be stayed by appeal, unless Appellate Court see sufficient cause, and security be given for due performance of its decree or order.

In what cases lower Court may stay execution.

This is a very wholesome provision, empowering the Court passing the decree, in extraordinary cases and peculiar circumstances, to stay execution thereof, on taking security from the party against whom the decree is passed. This power was not given to such Court under the former procedure, except in the instance of money decrees. Whenever execution of decree is stayed, security is to be demanded, whether the order have been passed by the Appellate Court or by the Court of original jurisdiction.

Under this Code the decree-holder can *execute his decree without giving security*, but he could not do so under the old law so long as an appeal was pending.

When the decree is for land or other immovable property, the decree-holder is allowed to execute his decree, pending appeal, unless good and sufficient cause for staying it be shown. When the decree is for money, the Court, in the exercise of its discretion, may allow the debtor to stay execution on giving good security.—Calcutta Sudder Court, 24th December 1861.

"Sufficient cause shown." In a case in which execution of a decree for land had been ordered, on security under Section 339, the Court did not consider it a sufficient ground for staying execution that some confusion might follow the change of owners, should the decree of the lower Court not stand in appeal.—Idem, 22nd January 1861.

"The Court making the order" means either the Appellate Court, or the Court which passed the decree.

Where the lower Court, in passing judgment, has ordered a witness or a party to be criminally prosecuted for perjury, the Sudder Court, pending the appeal of the case before it, holds itself competent to stay the execution, until further orders, of this portion of the decree of the lower Court.

SECTION 339.

[Repealed by Section 1, Act XXIII. 1861, and re-enacted by Section 36, as follows, with the addition of the second sentence.]

Security may be taken, by lower Court, when execution of a decree appealed against, has been ordered. Appellate Court may require lower Court to do so.

When an order is made for the execution of a decree against which an appeal has been preferred, it shall be lawful for the Court which pronounced the decree to require security to be given, for the restitution of any property which may be taken in execution of the decree or of the value thereof, and for the due performance of the decree or order of the Appellate Court. The Appellate Court may in any such case direct the Court which pronounced the decree to take such security.

This Section refers to those cases in which the appellant may not apply for staying execution. When execution is allowed in such cases, security may be demanded from the decree-holder pending appeal.

The last sentence in this amended Section empowers the Appellate Court to require security from the decree-holder, through the lower Court, in the event of that Court's not having demanded it.

See Section 358, comprising Section 37, Act XXIII. of 1861.

SECTION 340.

No such security to be required from Government or any public officer.

In suits instituted or defended under the authority and at the expense of Government, no such security as is mentioned in the last two preceding Sections may, in any case, be required from Government or from any public officer.

The cases conducted by public officers on their own responsibility, or the Court of Wards on behalf of minors and others, do not come within the meaning of this Section.

Of Procedure in Appeals from Decrees.

SECTION 341.

When a memorandum of appeal is presented in the prescribed form and within the time allowed, the Appellate Court, or the proper Officer of that Court, shall endorse thereon the date of presentment, and shall register the appeal in a book, to be kept for the purpose and called the Register of Appeals. Such Register shall be in the form contained in Schedule C. hereunto annexed.

How the appeal is to be entered.

Form of the Register.

"Every memorandum of appeal and application for the admission of a special appeal, presented in the prescribed form and within the time allowed, will be received and the date of presentment noted thereon; but no such appeals will be brought upon the registers, unless the batta requisite for serving notices upon the respondents be deposited within the time limited for appealing."—Madras Sudder Court, 1st October 1860.

SECTION 342.

It shall be in the discretion of the Appellate Court to demand security for costs from the appellant or not, as it shall see fit, before the respondent is called upon to appear and answer. Provided that the Court shall demand such security, in all cases in which the appellant is residing out of the British territories in India, and is not possessed of any land or other immovable property within those territories independent of the property to which the appeal relates; and in the event of such security not being furnished at the time of presenting the memorandum of appeal, or within such time as the Court shall order, the Court shall reject the appeal.

Appellate Court may, at its discretion, require security for costs from appellant.

Proviso, if not resident in British India, &c.

It will be seen from the rules of practice recently published that the Calcutta Sudder Court has, in the exercise of the discretion given to it by this Section, dispensed with security for costs from appellants. The provision for demanding security from appellants residing out of the British territories in India, is similar to that contained in Sections 34 and 35, regarding original suits.

"The respondent is called upon to appear and answer." No appeal can now be taken up without summoning the respondent, though its groundlessness may be apparent from a perusal of the memorandum of appeal. The practice, which was authorised by Regulation IX. of 1831, of rejecting appeals on the mere perusal of the petitions of appeal,

was voluntarily laid aside by the Calcutta Sudder Court, from a conviction of its being useless if not injurious.

"As a general rule, security for costs is not to be demanded from appellants: but if, for special reasons, the Court see fit to demand it, a date is to be fixed within which it must be furnished; and the appeal is to be rejected if the security be not furnished within such date." Madras Sudder Court, 1st October 1860.

The Bombay Sudder Court decided, 22nd February 1860, that security should be taken as hitherto in all cases, as a general rule.

SECTION 343.

When the memorandum of appeal has been registered, the Appellate Court shall send intimation thereof to the lower Court. If the appeal be from a Court, the records of which are not deposited in the Appellate Court, the lower Court shall, upon the receipt of the intimation, transmit to the Appellate Court with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court. Either party may give notice in writing to the lower Court, specifying any exhibits of which he requires copies to be made and deposited in the lower Court; and copies of such exhibits shall be prepared at the expense of the party giving the notice, and shall be deposited in the lower Court.

Appellate Court to send intimation to lower Court of appeal being registered.

Lower Court to transmit papers to Appellate Court.

Either party may give notice of exhibits of which he requires copies to be made and deposited in the lower Court.

The rules about the retention of copies of exhibits under this Section is a deviation from the former practice. A copy of the whole record was generally kept at the public expense. This Code enacts that the material portion of the original record, or such portion as may be called for, is to be sent to the Appellate Court, a copy of such exhibits only being retained as the parties may indicate, and at their cost. This last provision is undoubtedly meant to meet those cases in which the original record may be lost, destroyed, or tampered with, while in transit to the superior Court.

The Bombay Sudder Court, under date the 30th April 1860, ruled that, when papers are sent to the Appellate Court, but neither party gives the notice contemplated in this Section, copies of them need not be made for deposit in the lower Court.

The Madras Sudder Court held, 17th January 1860, that the provisions of this Section, as respects copies of

exhibits, are not applicable to the Courts of district moonsiffs, the records of which are deposited in the Appellate Court.

"On receiving intimation of the appeal being registered, the lower Appellate Court is to serve the notice upon the respondent by one of its own peons, and, on the original notice being returned, is to transmit it to the Sudder Court, accompanied by all material papers in the suit, and an English list of such papers. In doing so, the Court need not include the original or appeal judgments and decrees, as these must be produced by the special appellant, nor any merely formal papers, such as vakalutnamahs, notices, proclamations, summonses, warrants, &c. Where papers are sent to the Appellate Court, but neither party gives the notice contemplated in this Section, copies of them need not be made for deposit in the lower Court." Madras Sudder Court, 1st October 1860.

Held by the Bombay Sudder Court, 30th April 1860: "Copies* of papers in suits transmitted to Appellate Courts should be made and deposited only in the exceptional cases provided for in this Section."

Section 344.

Day for hearing the appeal, how to be fixed.

A day shall be fixed by the Appellate Court for the hearing of the appeal. The day shall be so fixed, with reference to the place of residence of the respondent and the time necessary for the service of the notice of appeal, as to allow the respondent a sufficient time to enable him to appear in person, or by a pleader, on such day.

"In person" includes an appearance by recognised agent.

Section 345.

Notice of day of hearing to be affixed in the Court-house, and served on respondent or his pleader.

Rules applicable thereto.

Notice of the day which has been fixed for hearing the appeal shall be affixed in the Appellate Court, and a like notice shall be sent by the Appellate Court to the lower Court, and shall be served on the respondent, in the same way as hereinbefore provided for the service of a summons to a defendant to appear and answer; and all rules applicable to such summons and to proceedings with reference to the service thereof shall apply to the service of such notice. The notice to the respondent shall contain

* Both in the law and in the constructions, copies of papers are spoken of, from a loose official habit, though but one copy is meant.

an intimation that, if he does not appear in the Appellate Court on the day so fixed for the hearing of the appeal, the case will be heard and decided *ex-parte* in his absence. Provided that, if the respondent has appointed a pleader to appear in his behalf in the Appellate Court, the service of the notice on such pleader shall be sufficient.*

Tenor of notice.

"The notice is to the respondent only. Appellants are required to take notice of all orders of the Court, fixing dates for the hearing or adjourned hearing of appeals, without being served with any process.

"It is not expressly laid down that notice of the day fixed for the hearing of the appeal, shall be affixed in the Appellate Court immediately upon the appeal being registered, and while the appellant may be presumed to be still in Court; but it is to be inferred that such was intended,—the date being fixed according to the state of the file, and the hearing being afterwards adjourned, if necessary, to a subsequent date.

"Notices to respondents, issued under this Section, are to be sent to the lower Court, for service,—the batta to be levied being that laid down for such lower Court without any extra charge for postage."—Madras Sudder Court, 1st October 1860.

The Madras Sudder Court held, 25th January 1861, that notice to the respondent should always be issued immediately upon an appeal being registered, and that it would be inconsistent with this Section to serve such notice one month before date of hearing. In cases where the Government is a party, sufficient time should be allowed to enable the Collector to obtain the instructions of the Board of Revenue and Government, as to defending the appeals.

Held by the Agra Sudder Court, in the case of Rampershad *v.* Hunooman, decided 27th February 1861: "Payment of *tulubana* by plaintiff, for issue of notice to defendant (respondent,) is not required under this Section, the service of such notice on defendant's (respondent's) pleader being sufficient."

Held by the Bombay Sudder Court, 22nd February 1860, that sixty days' notice is to be given in all cases as hitherto.

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* See note to Section 358, *post*.

SECTION 346.

Consequence of non-appearance of appellant.

If, on the day fixed for hearing the appeal, or any other day subsequent thereto to which the hearing of the appeal may be adjourned, the appellant shall not appear in person or by a pleader, the appeal shall be dismissed for default. If the appellant shall appear in person or by a pleader, and the respondent shall not appear in person or by a pleader, the appeal shall be heard *ex-parte* in his absence.

The Calcutta Sudder Court held, 24th March 1860, that if an appellant fail to pay into the lower Court the costs of serving notice of the appeal on the respondent, and thereby render it impossible for the respondent to appear, the appeal may, on its coming up for hearing at the appointed time, be dismissed for default of prosecution.

The Madras Sudder Court held, 1st September 1860, that, if the costs of serving notice on the respondent be not deposited within the time for appealing, no memorandum of appeal should be brought on the register of appeals under Section 341.

See the rules under Section 113 *a & b*, which are applicable to appeals. The diversity of rulings of the Sudder Courts, on this and the preceding Section, implies a defect in the law, and manifests the inconvenience of requiring notices like these to be served by the Court, instead of leaving them to be served by the attorney, in communication with the officers of the Court, as is generally done. It is the interest of the attorney, but not that of the officers, to look to the due observance of the requisite forms.

SECTION 347.

Re-admission, on cause shown, of appeals dismissed for default.

If an appeal be dismissed for default of prosecution, the appellant may, within thirty days from the date of the dismissal, apply to the Appellate Court for the re-admission of the appeal; and if it shall be proved, to the satisfaction of the Court, that the appellant was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the Court may re-admit the appeal.

This Section greatly relaxes the severity in the procedure as to appeals, which Act XVI. of 1845, authorised, without effecting the object in view. By that law an appeal dismissed on default could not be restored, unless the default was occasioned by the negligence of the pleader or other unavoidable cause. The practical effect of the rule was, that the Courts were obliged to reject applications for

restoration, on the ground of the cause shown being not unavoidable, although they might have been otherwise satisfied of its sufficiency. This Section very wisely gives a large discretion to the Appellate Courts in such cases.

The Madras Sudder Court held, 17th January 1860, that there is no provision in the Code for special appeal, if an Appellate Court refuse to re-admit an appeal, which was dismissed for default of prosecution.

SECTION 348.

Upon the hearing of the appeal, the respondent may take any objection to the decision of the lower Court which he might have taken if he had preferred a separate appeal from such decision.

Respondent may object to decision of lower Court, as if he had preferred a separate appeal.

This Section repeals the provision of Clause 3, Section 7, Act XV. of 1853, and reverts in a great measure to the practice which previously obtained for a long time, in this Presidency, under Construction 868. The Act of 1853 in some instances operated as a real hardship. Even when the case of a plaintiff was dismissed *in toto* on the merits, the defendant, who had failed on the plea of limitation, was obliged to prefer a separate appeal on full stamp, if he wished to plead, in the Appellate Court, the point of limitation which had been decided against him in the lower Court.*

See the Calcutta Sudder Court's ruling, noted under Section 366.

"Objection." The Madras Sudder Court held, 19th March 1860, that objections in writing cannot be received, but must be taken orally at the hearing, noted down by the judge, and set forth in the judgment among the points for determination (Section 359).

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* The Chief Justice of the Calcutta High Court, in the case of Issur Ghose *v.* Hills, decided 4th September, 1862, remarked that, "but for the liberty given to a respondent by this Section, injustice might frequently be done." But he failed to notice that the Act cited in the comments, gave such liberty to the respondent, provided he brought his objections before the Court in a written statement, on a stamp, in the manner done by the appellant. The present rule is consequently not equitable. Nor is it analogous to the provision in Section 121, which requires the defendant, who may wish to plead a set-off, to put in a written statement regarding it on a stamp, before doing so. It must not be forgotten that this Code, though intended to provide a natural procedure, does not permit the Courts to do complete justice to litigants, but only such a modicum of it as the course they have taken will allow. For instance, if a plaintiff be found to have asked for less than what is justly due to him, or a defendant to make admissions prejudicial to his equitable claims, will the Court decree what the justice of either case requires or only what is authorised by the rules of law, in other words, special pleading?

The Agra Sudder Court resolved, 8th June 1861, that "it is optional to the respondent to file a written statement of the nature specified in Sections 120 to 124, in regard to original suits, or to confine himself to taking oral objections at the hearing of the appeal.*

SECTION 349.

The Appellate Court how to give judgment.

The Appellate Court, after hearing the appeal, shall proceed to give its judgment, in the manner hereinbefore prescribed for giving judgment in Courts of original jurisdiction.

See Section 183.

SECTION 350.

No decree to be reversed for immaterial error, defect, or irregularity.

The judgment may be for confirming or reversing, or modifying the decree of the lower Court. But no decree shall be reversed or modified, nor shall any case be remanded to the lower Court, on account of any error, defect, or irregularity, either in the decision or in any interlocutory order passed in the suit, not affecting the merits of the case or the jurisdiction of the Court.

This is a re-enactment of the principle of Act IX. of 1854. It was doubtful whether under that law questions connected with the sufficiency of the stamps, or the jurisdiction of the Court of first instance which tried the case, could be taken up by the Appellate Court if passed over in the lower Court. This Section removes the doubt. No decree is to be reversed or modified, and no case remanded for any error, defect, or irregularity, not affecting *the merits of the case* or *the jurisdiction of the Court.*

SECTION 351.

Case may be remanded when decree is reversed for excluding material evidence.

Copy of decree in appeal to be sent, with directions to re-hear.

If the lower Court shall have disposed of the case upon any preliminary point, so as to exclude any evidence of fact which shall appear to the Appellate Court essential to the rights of the parties, and the decree of the lower Court upon such preliminary point shall be reversed by the decree in appeal, the Appellate Court may, if it think right, remand the case, together with a copy of the decree in appeal, to the lower Court, with directions to restore the suit to its original number in the Register, and proceed to investigate the merits of the case, and pass a decree thereon.†

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* A difference of opinion is here also observable, owing to the indefiniteness of the rule established.

† Act X. of 1862, Schedule *B.* article 11, *note f.* provides as follows:

"If an appeal or plaint, which shall have been rejected by the lower Court on any of the grounds mentioned in the Code of Civil Procedure, shall be ordered to be

The Calcutta Sudder Court held, 7th January 1860, that a case having been remanded and re-investigated subsequently to this Code's coming into operation, the appeal from the decision must be governed by the provisions of this Code. The Madras Sudder Court adopted this ruling, 1st October 1860.

The Madras Sudder Court held, 19th March 1860, that, in cases where the lower Court has had the parties before it, and given a decision, though only on some "preliminary point," a regular appeal only will lie.

SECTION 352.

Power to remand limited as above.

It shall not be competent to the Appellate Court to remand a case for a second decision by the lower Court, except as provided in the last preceding Section.*

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received, or if a suit shall be *remanded*, in appeal, for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorising him to receive back from the Collector the full amount of stamp duty paid on the petition of appeal."

"Upon such preliminary point." These words seem to be a superfluous addition to the draft of this Code. They would imply that only a portion of the decree has been reversed; but the context, and especially the concluding words, "pass a decree thereon," will not admit of that construction. The meaning of the latter part of this Section has been rather obscured by the alterations made in the draft. The passage originally stood thus: "The Appellate Court may, if it think right, remit the case to the lower Court, and cause the papers in the suit, together with a copy of the decree in appeal, to be transmitted to such lower Court, with directions to proceed in the investigation of the merits of the case, and pass a decree therein."

* The purport of this might well have been comprised in the preceding Section, by the insertion of a few words of the same tenor. The object of giving it prominence is probably to impress it on the minds of the Judges of Appellate Courts. Among other remarks on this part of the Code, the Royal Commissioners said, but in language rather ambiguous from the cautious terms used: "There is *reason* to fear, from the great number of cases that are commonly remitted to the lower Courts, that there *may be* some *abuse*, or an *excessive* exercise, of the power to remit."

Doubtless the Appellate Courts in British India, generally, are often obliged to remand cases, for further investigation on one or more points, on account of the oversight or inexperience of the Judges of original jurisdiction.

But it is probable that the words quoted allude to the practice, at a certain period, of some Judges of the Calcutta Sudder Court, who had never acted as district Judges, of remanding almost all cases that came before them, upon technical points of English law, suggested by astute attornies then acting as pleaders. The results of the practice were deplorable. Litigation was suspended, in one form or another, and protracted for years. The practitioners in the Courts profited. Cases were for the time got rid of, but without being decided. The suitors were harassed beyond conception. The lower Appellate Courts were confirmed in the habit of remanding cases for re-hearing, to avoid the labour of inquiring into and deciding them on the evidence in the record. The prevention of such a system has properly been aimed at throughout this Chapter. The Judicial Committee of the Privy Council, though composed of Judges familiar with special pleading, never, it is well known, reverse judgments of the Indian Courts on account of defects in the procedure that do not affect the merits.

SECTION 353.

When the evidence upon the record of the lower Court is sufficient* to enable the Appellate Court to pronounce a satisfactory judgment, the Appellate Court shall finally determine the case, notwithstanding that the judgment of the lower Court has proceeded wholly upon some other ground.

When the evidence is sufficient, the Appellate Court is to determine the case, though the lower Court has decided on other grounds.

"The Appellate Court will be at liberty to call upon the lower Court to explain, justify, or otherwise account for any part of its decree, or any omission appearing therein, and to take the reply into consideration in disposing of the appeal."—Madras Sudder Court, 1st October 1860.

SECTION 354.

If the lower Court shall have omitted to raise or try any issue, or to determine any question of fact, which shall appear to the Appellate Court essential to the right determination of the suit upon the merits, and the evidence upon the record is not sufficient† to enable the Appellate Court to determine such issue or question of fact, the Appellate Court may frame an issue or issues for trial by the lower Court, and may refer the same to the lower Court for trial. Thereupon the lower Court shall proceed to try such issue or issues, and shall return to the Appellate Court its finding thereon, together with the evidence. Such finding and evidence shall become part of the record in the suit; and either party‡ may, within a time to be fixed by the Appellate Court, file a memorandum of any objection to the finding; and after the expiration of the period so fixed, the Appellate Court shall proceed to determine the appeal.

Trial of issues by lower Court on reference from Appellate Court.

The Madras Sudder Court ruled, 19th March and 1st October 1860: "It is competent to the Appellate Court to direct that any person, having an interest in the subject matter of the suit inseparable from that of either of the parties, be made a plaintiff or defendant, and, to frame an issue accordingly, and refer the same to the lower Court for trial. In such cases it will be sufficient, without the use of stamps, for the Court to note down at the hearing the necessary particulars to enable it to frame the issue. The lower Court, in proceeding to try the issue, will cause a notice to be served on the person, as provided by Section 23."

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* Under this Section, the Appellate Court may decide a case in any manner it pleases, whereas it is essential to a proper decision that the point at *issue* should be distinctly understood, and that there should be evidence directly bearing on the point.

† The only proper rule to go by is that furnished in this Section, excepting that portion of it which allows the Appellate Court to determine what may be "sufficient" evidence upon any particular issue that should have been raised in the original suit.

‡ By this rule, the respondent, without having been at any expense, is placed on a footing with the appellant, who has been at the cost of making the appeal, and bringing the matter before the High Court.

SECTION 355.

Additional evidence may be allowed in Appellate Court, if required on sufficient grounds, or lower Court rejected competent evidence.

It shall not be competent to the parties in an appeal to produce additional evidence in the Appellate Court, whether of exhibits or witnesses; but if it appear that the lower Court refused to admit competent evidence, or if the Appellate Court require any exhibits to be produced or witnesses examined, to enable it to pronounce a satisfactory judgment, or for any other substantial cause, the Appellate Court may allow additional exhibits to be received and any necessary witnesses to be examined, whether such witnesses shall have been previously examined in the Court below or not. Provided that, whenever additional evidence is admitted by an Appellate Court, the reasons for the admission shall be recorded on the proceedings of such Court.*

Grounds thereof to be recorded.

SECTION 356.

Additional evidence by whom and how to be taken.

Whenever additional evidence is permitted to be received, it shall be competent to the Appellate Court to take such evidence before itself,† or to require the lower or any other Court, or to empower any person, to take such evidence, and to transmit the evidence so taken to the Appellate Court. It shall also be competent to the Appellate Court to prescribe the manner in which such evidence shall be taken.

SECTION 357.

Points to be defined and recorded.

In all cases where additional evidence is permitted to be taken, the Appellate Court shall define the point or points to which the evidence is to be confined, and record the same on its proceedings.

These Sections introduce general improvements in the procedure of the Appellate Court. They supply some defects that prevailed, and make clear some points that were doubtful and ambiguous.

It had been the practice to remand a case when the lower Court had decided it on a preliminary point without giving any opinion on other points, although evidence had been filed by the parties on all the issues raised. This was uselessly prolonging litigation, as the Appellate Court, after overruling the preliminary objections which had been allowed in the lower Court, could immediately have proceeded

* This rule is contrary to the principles of the two preceding Sections. It is inconsistent with the constitution of an Appellate Court to receive evidence, that may or should have been submitted to the Court of original jurisdiction. It is not at all a redeeming feature of the practice hereby allowed, that the reasons for a deviation from the normal course should be recorded.

† This rule cannot apply to the High Court, except when the suit has arisen in a neighbouring district.

to decide the case on the other points, and perhaps with greater satisfaction to the parties.

Section 351 properly enacts that a case may be remanded when, the decision on the preliminary point being set aside, there does not appear sufficient evidence on the record on the other points to enable the Appellate Court to decide the case at once. But when there is sufficient evidence on the record, the Appellate Court must decide the case without further reference to the lower Court. *Vide* Sections 352 and 353.

Section 354 supplies a material defect in the former practice. The Appellate Court, when it discovered that some material issue had not been raised, or, having been raised, had not been tried, and that the evidence was defective or incomplete on that point, could not decide the case, but was obliged to set aside the judgment and remand the case to the lower Court for the trial of that issue. By this Code the Appellate Court is empowered to retain the case on its file, and to frame any issues that may be necessary, and send such issues, or those which had been omitted to be tried, to the lower Court for trial, and, on receipt of the finding on those issues by the lower Court, finally to dispose of the case. The time for offering objections to such finding may be fixed by the Appellate Court, when sending the issues to the lower Court, or on receipt of the finding.

Sections 355, 356, and 357. The circumstances under which additional evidence is to be admitted in the Appellate Court were not clearly provided for in the Regulations. Section 16, Regulation VI. of 1793, of the Bengal Code, was the only law bearing on the point. These Sections supply the omission, and clearly lay down when and how additional evidence may be taken by the Appellate Court. Such evidence may be taken by the Appellate Court itself, or by any other Court or any person whom it may empower to do so. The Appellate Court may prescribe the manner in which such evidence should be taken, that is, whether by commission or otherwise, and whether in the form of a narrative or by way of question and answer.

SECTION 358.

[Repealed by Section 1, Act XXIII. of 1861, and re-enacted by Section 37, in general terms, as follows :]

Appellate Court have the same powers as Courts of original jurisdiction.

Unless when otherwise provided, the Appellate Court shall have the same powers, in cases of appeal, which are vested in the Courts of original jurisdiction, in respect of original suits.*

Though the terms of the original Section (358,) were not general,† they were treated in the former editions as intended to be so. This Section (it was observed) gives the Appellate Court all the powers, regarding the disposal of appealed cases, which the Court of original jurisdiction has in the trial of suits under similar circumstances. By the use of the general term *otherwise*, it is evidently intended to include all corresponding powers. For instance, an Appellate Court may order arrest of the person in default of bail, or attachment of property in default of security; it may grant an injunction or appoint a receiver, when it may deem either or both of these measures proper and necessary. The more comprehensive terms used in the amended Section set at rest any doubts that could have been entertained.

The Madras Sudder Court, 13th March 1860, ruled that the provisions of Section 98 cannot be made applicable to appeals, because at that stage of a suit the issues must have been settled, the *witnesses examined*, and the whole case fully investigated, and therefore it must be too late for a party to apply for a refund of stamp duty, on the ground that the suit has been privately adjusted.

See, under Section 98, the same Court's ruling, of 1st May 1861, as to appeals adjusted.

SECTION 359.

Judgment of the Appellate Court.

The judgment of the Appellate Court shall be pronounced in open Court. It shall contain the point or points for determination, the decision thereupon, and the reasons for the decision, and shall be dated and signed, by the Judge, or by the Judges concurring therein, at the time of

* See the provisions in Section 113 *a—c*, regarding non-service of summons in original suits, and notice to respondents in appeals, through failure to deposit the cost of service.

† The original Section (358) was thus worded: "The Appellate Court shall have all the like powers, in regard to the granting of time, adjourning the hearing of the suit, examining the parties or their pleaders, and awarding costs or otherwise, as are hereinbefore contained in regard to Courts of original jurisdiction."

pronouncing it.* The judgment shall be written in the English language; but if the Judge shall not be able to write an intelligible judgment in that language, the judgment shall be written in the vernacular language of the Judge. When the language, in which the judgment is written is not the language in ordinary use in proceedings before the Court, the judgment shall be translated into such language, and the translation shall be signed by the Judge or Judges. Any Judge dissenting from the judgment of the Court shall state his opinion in writing, which shall form part of the record.

In what language it is to be written.

Dissent to be recorded.

The Madras Sudder Court held, 25th January 1861, that every Native Principal Sudder Ameen, who is able to write intelligibly in English, is bound to write all his appeal judgments in that language.

The Bombay Sudder Court replied, 30th October 1860, to a inquiry whether it was necessary to set forth in the judgment the details of the plaint and defence, and the lower Court's judgment thereon, that the procedure previously observed should be continued.

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* This rule seems to be little understood. It is the practice generally to preface the written judgment with an ample history of the origin and progress of the dispute between the parties, the nature and grounds of the lower Court's decision, and, sometimes, a summary of the arguments of counsel, while the points for determination in the Appellate Court are often omitted. A paper of this description forms a report of the case, not the written judgment contemplated by this Section.

The object of the Legislature in enacting the law of 1843, which is the basis of this Section, was to require the judges, before pronouncing judgment, to record *briefly* the points here mentioned, so as effectually to prevent the practice, of some judges, both European and Native, of getting their judgments written out for them by their ministerial officers, in the vernacular language of the Court.

What the law requires is that every judicial officer should write, with his own hand, in his mother-tongue, or in the English language if he can, 1st, the point or points for determination, *i. e.* the issues which have been framed; 2nd, the decision thereupon, *i. e.* the conclusions he has arrived at; and 3rd, the reasons for the decision, *i. e.* the facts which he has found and the law which he considers applicable to the facts. The reasons are to be *succinctly* expressed, because it is intended that there should be clear evidence that the subject was understood by the judge and that the conclusions recorded (in other words the decree pronounced) are his own and were not dictated to him. The written judgment must be prepared before pronouncing this decision. It may be prepared beforehand or at the time in Court, but it must be signed at the time. This rule is intended to prevent alteration of the decision after it has been pronounced, as well as the possibility of a second decree of a contrary or different tenor being given.

As the judgment may be written elsewhere than in open Court, there is nothing to prevent the judge's reasons being stated at any length that may be deemed proper. The object of this record, however, implies a brief statement of the issues, the decision, and the grounds thereof. A detailed exposition of the facts of the case and the reasons on which are founded the conclusions arrived at, may be given, if desired, in a separate paper, without interfering with the intent of the law.

The misapprehension which has been alluded to, has in some measure arisen from the same term being here used for two different things, the judgment delivered *vivâ voce* in the Court, for the information of those present, and the written judgment (written beforehand or then and there) which is intended to serve merely as a record.

SECTION 360.

What the decree is to contain.

The decree of the Appellate Court shall bear date the day on which the judgment was passed. It shall contain the number of the suit, the names and description of the parties, appellant and respondent, and the memorandum of appeal, and shall specify clearly the relief granted or other determination of the appeal. It shall also state the amount of costs incurred in the appeal, and by what parties and in what portions such costs and the costs in the original suit are to be paid. The decree shall be signed by the Judge or Judges who passed it, and shall be sealed with the seal of the Court. If there be a difference of opinion among the Judges of the Court, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree, but the opinion of such Judge shall be recited in the decree. Certified copies of the decree shall be furnished to the parties, in the same manner as hereinbefore provided in regard to the decrees of Courts of original jurisdiction.

The same distinction is here made between a judgment and a decree of an Appellate Court, as is observed in regard to suits decided by Courts of original jurisdiction.

SECTION 361.

A certified copy of the decree to be transmitted to the lower Court. The final judgment to be entered in the Register of suits.

A copy of the decree or other order disposing of the appeal, certified by the Appellate Court or the proper officer of such Court, and sealed with the seal of the Court, shall be transmitted to the Court which passed the first decree in the suit appealed from, and shall be filed with the original proceedings in the suit; and an entry of the judgment of the Appellate Court shall be made in the original Register of the suit.

The Bombay Sudder Court, in reply to a reference stated, 2nd October 1860, that the records of the original Courts in suits tried before them are to be sent to the Hoozoor, as heretofore; and that, as Regulation II. of 1827, Section 31, Clause 8, of the Bombay Code, is still unrepealed, this Section (361) must be interpreted to stand with it.

SECTION 362.

How to be executed.

Application for execution of the decree of an Appellate Court shall be made to the Court which passed the first decree in the suit, and shall be executed by that Court, in the manner and according to the rules hereinbefore contained for the execution of original decrees.

This is in conformity with Act XXV. of 1852.

Held by the Madras Sudder Court, 1st March 1861: "A Civil Judge has no power to execute, or take any steps towards the execution, of any decree which, under the

provisions of this Section, ought to be executed by a district moonsiff or other subordinate judicial officer, notwithstanding that such officer may be absent, and the property decreed may be in course of alienation."

Appeals from Orders.

SECTION 363.

No appeal from order passed before decree. Any material error, defect, or irregularity therein may be set forth as an objection, if the decree be appealed against.

No appeal shall lie from any order passed in the course of a suit, and relating thereto, prior to decree; but if the decree be appealed against, any error, defect, or irregularity in any such order, affecting the merits of the case or the jurisdiction of the Court, may be set forth as a ground of objection in the memorandum of appeal.

The Bombay Sudder Court ruled, 15th November 1860, that, if a Zillah Judge have received and heard an appeal contrary to the provisions of Sections 363 and 364 of this Code, it is competent to the Sudder Court to declare any order passed in such appeal null and void.

Held by the Bombay Sudder Court, 15th November 1860: "An appeal will lie to the Sudder Court against any order passed under Regulation IV. of 1827, of the Bombay Code."

SECTION 364.

No appeal from order in execution of decree, except as provided.

No appeal shall lie from any order passed after decree and relating to the execution thereof, except as is hereinbefore expressly provided.

These Sections treat of appeals from interlocutory and other orders not decretal. An order passed during the progress of a suit, relating to it, which may affect the merits of the case, will form a ground of appeal in the appeal regularly preferred after decree, that is, the final disposal of the case. For instance, the first Court may refuse to summon a material witness cited by either party. Although there is no appeal against this order while the suit is pending, it will form an objection to the decree in the Appellate Court.

The different Sections of this Code distinctly lay down where an appeal is allowed and where not. An appeal should be entertained only when thus expressly provided for, excepting in those cases where, from the context, it may be obvious that an appeal was contemplated. The following Table shows at once the Sections which provide for an appeal.

Before Decree.

Sections 36, 76, 94, 119, 159, 160, 168, 169, and 171.

After Decree.

Sections 257 and 283.

It will be seen that the rules of this Code, as far as they relate to appeals from interlocutory orders before the passing of a decree, are similar in spirit to those contained in the Circular Orders of the Calcutta Sudder Court of 2nd February 1859, which, with few exceptions, interdicted such appeals.

Under the wording of this Section, the Calcutta Sudder Court held, 19th January 1860, that there can be no appeal from orders in execution of decrees other than those specifically mentioned in Section 283.

Held by the Madras Sudder Court, 1st October 1860: "There can be no other appeal than what the law provides; and therefore, though an order appear, on the face of it, to be contrary to the provisions of the Act, no appeal against it can be received; but the irregularity may be pointed out, and the officer cautioned against repeating it.

"No appeal, unless it be expressly provided, will lie against an order passed in execution of a decree, though such order be repugnant to the terms of the decree, or to some law or regulation in force at the time of its being passed."

It was remarked, in the second edition of this work, with reference to the Calcutta Sudder Court's ruling, that it was doubtful whether this ruling were consistent with the intentions of the Legislature. The Section cited (283) has since been modified and extended to various cases, to which, strictly speaking, it was not before applicable.

The Agra Sudder Court held, on a reference from the judge of Benares, that no appeals lie from orders passed under Sections 203, 204, and 243, such orders being "after decree passed and relating to the execution thereof."

Held by the Madras Sudder Court, 17th May 1861: "An order passed by a district moonsiff, directing execution of a decree in favor of the heir of a deceased decree-holder, is not subject to appeal, though such heir may not have obtained a certificate."

Held by the same Court, 24th April 1861: "If a lower Court exceed its jurisdiction when passing an order in execution, from which no appeal lies, the Appellate Court

is competent to point out that the order cannot stand, but it cannot enter upon the merits of the case."

SECTION 365.

Appeal from orders as to fines or imprisonment.

All orders as to fines or the levying thereof, or as to imprisonment under this Act, (except when the imprisonment is in execution of the decree,) shall be subject to appeal.

This Section relates to cases where a fine is imposed on a recusant or defaulting witness, or where a witness is committed to close custody under Sections 159, 160, 168, and 169. An exception is made in the case of the defendant, who is imprisoned under the sanction of a decree: no appeal is allowed him. Orders passed in the case of levying fines are appealable, as they relate to questions and parties not connected with the suit. For instance, if the levy is ordered to be made by the sale of property claimed as not belonging to the party fined, any order passed upon such claim, either allowing or rejecting it, is appealable.

SECTION 366.

Procedure in appeals from orders.

When an appeal from any order is allowed, the period for preferring the appeal and the procedure thereon shall be, in all respects, the same as in an appeal from a decree.*

That is, after the memorandum of appeal is filed, the record is to be sent for, and the respondent summoned to appear on a day fixed for the hearing of the appeal. In other words, the appeal will be treated in every respect as a regular appeal from a decree.

In a case in which the order appealed from, and the petition of appeal, were of dates subsequent to the passing of this Code, the Calcutta Sudder Court held, 1st November 1859, that it was not competent to the Court to hear the appeal in the presence of one of the parties, but that all the forms of procedure, required by Sections 344, 345, and

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* Act X. of 1862, Schedule *B.* Art. 9, has the following rule, regarding the stamp for summary appeals from orders:

"Petition of appeal, not being from an order rejecting a plaint or from a decree or order having by any law the force of a decree, and petition or application presented to any Civil Court, shall be written upon stampt paper of the following value, namely,

When presented to the Sudder Court, ... 2 0 0
When presented to any Court below the Sudder Court, ... 0 8 0"

316, should have been gone through. This ruling was adopted by the Madras Sudder Court, 1st October 1860.

On an inquiry from the judge of Moradabad, as to whether appeals preferred to his Court, under Section 36, from orders rejecting plaints under Section 29, were to be treated as summary or regular, the Agra Sudder Court held that this Code recognises only *one* procedure for appeals, of whatever description.

CHAPTER IX.

Of Appeals in Forma Pauperis.

Section 367.

Who may appeal as pauper.

Any party to a suit, who may be unable to pay for the stamps required for the prosecution of an appeal from the decision passed therein, may be allowed to appeal as a pauper from such decision, subject to all the rules contained in the last preceding Chapter and in Chapter V., in so far as they are applicable.

The Calcutta Sudder Court ruled, 3rd December 1859, that, previously to admitting a pauper's appeal from an order, nonsuiting him for indistinctness as to the date of his alleged dispossession, the Court should satisfy itself that the claim was not barred by limitation.

Held by the Bombay Sudder Court, 21st November 1860: "Security for costs in a regular appeal must be furnished by a pauper appellant; and when a pauper presents an application for the admission of a special appeal, the Judges who may order its registration will at the time decide whether security for costs should be furnished or not."

Section 368.

Application to whom and when to be presented.

The application to be allowed to appeal *in formâ pauperis* shall be written on a stampt paper of the value of one Rupee if the appeal lie to the District Court, and on a stampt paper of the value of two Rupees if the appeal lie to the Sudder Court, and shall be presented in the Appellate Court within the period allowed for the presentation of a memorandum of appeal.

See the latter part of Section 373, with regard to special appeals.

SECTION 369.

Form of application, accompanied with schedule of property, &c.

The application* shall contain the particulars required to be set forth in the memorandum of appeal, and shall be drawn up in the like manner. It shall have annexed to it a schedule of any movable or immovable property belonging to the applicant with estimated value thereof, and shall also be accompanied by copies† of the judgment and decree from which the appeal is made.

SECTION 370.

Procedure.

If the Appellate Court, upon a perusal of the application and of the judgment and decree of the Court below, shall see no reason to think that the decision of that Court is contrary to law, or to some usage having the force of law, or is otherwise erroneous or unjust, it shall reject the application.‡ If the application be not rejected upon any of the grounds abovementioned, inquiry shall be made into the alleged pauperism of the applicant; and such inquiry may be conducted either by the Appellate Court or by the Court from whose decision the appeal is made under the orders of the Appellate Court. Provided that, if the applicant was allowed to sue *in formâ pauperis* in the Court below, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court shall see special cause to direct such inquiry.

The Bombay Sudder Court held, 24th April 1860, that this Section does not appear to contemplate that an application for permission to appeal *in formâ pauperis* should be opposed, and consequently declined to record a vukalutnamah presented by a pleader desirous of appearing on behalf of the opposite party.

SECTION 371.

Effect of order by Appellate Court.

The order passed by the Appellate Court on an application to be allowed to appeal *in formâ pauperis*, whether for the admission or rejection of the application, shall be final; but, if the application be rejected, the Appel-

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* The pauper has no appeal as a matter of right, as appears from the peculiar procedure prescribed, in Section 370, for the trial of *his* appeal. He is required to make an "application to be *allowed* to appeal." But, as it would seem from this Section that the "application" is to be similar to the "memorandum of appeal," with the addition of a schedule of his property, perhaps no real difference is intended by the use of the word "application."

† As observed in the note to Section 343, but one copy is meant.

‡ This Section revives the system, which allowed the Appellate Court to confirm decisions, on merely perusing the petition of appeal and the decree of the lower Court. Under the old law the petition contained the *reasons* at length on which the appeal was made. Under the procedure introduced by this Code, nothing more than a syllabus of the objections to the decree can be stated in the memorandum of appeal. Nor is there any room for supposing that counsel may be heard on the *merits* of the appellant's case. The revival of that system, so generally and justly condemned, in a worse form, is the more objectionable, because it is both inconsistent with the procedure prescribed, in Section 342, for general observance, and implies that the pauper has less claims than others to an attentive consideration of his appeal.

late Court may, if it think proper, allow the applicant a reasonable time for preferring an appeal on a stamp of the value prescribed for appeals from decrees.

The procedure laid down in these Sections for the institution of pauper appeals is generally the same as it was before the passing of the Code. One material difference is, that when a party wishing to appeal *in formâ pauperis* is in the position he occupied (that of a pauper) in the lower Court, a second useless inquiry into his pauperism is done away with. The Court, however, has discretion to make such inquiry if it appear to be called for. An appeal *in formâ pauperis* is in other respects to follow the course laid down for the admission of pauper suits. The memorandum of appeal and the schedule having been filed in due time and on proper stamp, the Court is to determine first, as provided in Section 370, whether the judgment appealed from is wrong on the face of it. If the Court be satisfied about the admission of the appeal on that point, it is then to proceed to investigate, subject to the proviso contained in that Section, the alleged pauperism of the appellant, under the provisions of Sections 305, 306, and 307. The copy of the judgment and decree, mentioned in Section 369, is to be on plain paper, as provided in Section 308. Before the Code came into operation, in cases where the appeal was not palpably vexatious, the Appellate Court allowed further time for filing the appeal on proper stamp, after the rejection of the appeal *in formâ pauperis*, in the same manner as provided in Section 371.

CHAPTER X.

OF SPECIAL APPEALS.

SECTION 372.

Special appeals to Sudder Court.

Grounds of special appeal.

Unless otherwise provided by any law for the time being in force,* a special appeal shall lie to the Sudder Court, from all decisions passed in regular appeal by the Courts subordinate to the Sudder Court, on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in law in the procedure or investigation of the case, which may

* The exceptions are contained in Section 372 *a—h*, which see.

have produced error or defect in the decision of the case upon the merits, and on no other ground.

It will be seen that the grounds on which special appeals are to be admitted are very much narrowed by this Code. They are but two, that is, where the decision appealed from is contrary to law, and where a *substantial error* or defect *in law* in the procedure or investigation of a case has occurred. Under this Section, misconstruction of a document, defective investigation, and other circumstances, which were proper grounds of special appeal under the old law, are no longer so. The following will show the difference.

Grounds of appeal under the old law.	Grounds of appeal under the new law.
1. That the decision failed to determine all material points in difference in the cause, *or* determined any of them contrary to law or usage having the force of law.	1. That the decision is contrary to some law or usage having the force of law.
2. That there was misconstruction of some document.*	
3. That there was some ambiguity in the decision affecting the merits.	
4. That there was some substantial error or defect in	2. That there has been some substantial error or de-

* Notwithstanding the exclusion of this ground from the existing law of special appeal, the Calcutta Sudder Court (present Messrs. H. T. Raikes and C. B. Trevor) held, 1st October 1861: "The misconstruction of a written document, forming the basis of a plaintiff's claim or a defendant's plea in a suit under Act X. of 1859, is a substantial error in law in the investigation of the case, which may produce errors in the decision thereof on its merits, and is consequently a ground of special appeal under Section 372, Act VIII. of 1859."

If this decision form a precedent, there will be three grounds of special appeal, a contrariety owing to the intentions of the Legislature being expressed in technical language, not very intelligible in itself and therefore susceptible of meanings it was not intended to bear. It is observable that in Act XII. as well as in Section 28, Act XXIII. of 1861, (Section 372 *b*,) a difference of opinion between two Judges of Small Cause Courts, when sitting together, "on the construction of a document affecting the merits of the decision," is a ground of reference on the point for the decision of the Sudder Court. This would indicate either the correctness of the above ruling and the necessity of altering the wording of this Section so as to assimilate it, in this respect, to the previous law, or a failure of "the legislative memory," (to use Lord Brougham's expression,) if not a change of legislative opinion subsequent to the enactment of this Code. See the Sections alluded to, immediately following this.

the procedure or investigation of the case, apparent on the record, and likely to have produced error or defect in the decision of the case upon the merits.

fect in law in the procedure or investigation of the case, which has produced error or defect in the decision of the case upon the merits.

The special appeals are to be against the decisions passed in regular appeal only. This provision dispenses with all special appeals to the Sudder Court heretofore allowed from orders passed in execution of decrees and otherwise.

"No special appeal lies from any order passed by a lower Appellate Court on an appeal from an order of a Court of first instance." Madras Sudder Court, 1st October 1860.

A special appeal will lie to the Sudder Courts from decisions of Judges passed on appeal from those of the Collectors under Act X. of 1859. It was so ruled by the Calcutta Sudder Court, on the 30th March 1861, with which the Agra Sudder Court concurred. It was proposed to make this a part of the Rents Law, Act X. 1859, "to remove any further doubts;" but the Legislative Council of the Bengal Government considered it unnecessary to adopt the proposition. The correctness of the ruling is assumed in Act XII. of 1861, which alludes to "regular and special appeals" from decisions under Act X. of 1859.

The Calcutta Sudder Court held, 14th October 1859, with reference to the last clause of Section 386, that special appeals from Hazareebaugh, Lohardugga, and Maunbhoom, (to which this Act has been extended by the Government Orders of the 15th June 1860,) lie to the Sudder Court.

Held by the Agra Sudder Court, 21st March 1861; "A special appeal will lie from an award of costs, whenever the judgment awards costs upon a principle not sanctioned by law, or usage having the force of law, in which are included the established practice of the Courts."*

* It is not clear whether in this case the award of costs, "upon a principle not sanctioned by law," was made by the Court of first instance and the Court of appeal, or only by the latter.

SECTION 372 *a*.

[Section 27, Act XXIII. of 1861.]

No special appeal from decision of any Court subordinate to the Sudder Court in certain suits.

No special appeal shall lie from any decision or order, which shall be passed on regular appeal after the passing of this Act, by any Court subordinate to the Sudder Court, in any suit of the nature cognizable in Courts of Small Causes under Act XLII. of 1860, *(for the establishment of Courts of Small Causes beyond the local limits of the jurisdiction of the Supreme Courts of Judicature established by Royal Charter)*, when the debt, damage, or demand, for which the original suit shall be instituted, shall not exceed five hundred Rupees; but every such order or decision shall be final.

On the establishment of Small Cause Courts in the Mofussil, by Act XLII. of 1860, the above rule, with the seven by which it is followed, was enacted by Act XLIII. of the same year, "to afford relief to the Sudder Courts of this Presidency." It takes away the right of special appeal in all cases cognizable by the Small Cause Courts. (The cases in question are described at page 44 of this work, the 1st paragraph.) The rules which follow it are intended to provide a succedaneum for that right. It is doubtful if they will be generally useful. For, as the suits are supposed to be "not very intricate," so that they may be decided by single Judges of these Courts without appeal, the Judges of the District Courts or the Principal Sudder Ameens, in deciding cases of that nature in appeal, will seldom see the necessity of seeking the opinion of the Superior Court on any point involved therein. On the other hand, most suitors, whose mistrust of the local Courts is undeniable, will be anxious that such references should be made, though their wishes are seldom likely to be gratified.

This restriction of the right of special appeal, and the rule adopted in Section 332 *a*, constituting two Judges or even one a full bench, are contrary both to the views on which Acts II. and III. of 1843 were framed, and to the public opinion. One of those views was uniformity of law and practice, by enabling suitors, under legal advice, to subject decisions considered erroneous to the test of examination by the highest Court of Appeal in the country, whose judgments thereon should form precedents binding on all subordinate Courts. The other was the confidence of the people in the Courts, in seeing important cases and doubtful points of law tried before at least three judges, on the principle recommended by the Court of Directors—that

not only justice should be done, but that the people should be satisfied that it has been done.

These alterations labour also under the disadvantage of being based on no intelligible principles.*

SECTION 372 *b*.

[Section 28, Act XXIII. of 1861.]

Reference of question to the Sudder Court.

If in any suit, in which an order or decision is made final under the last preceding Section, any question of law, or usage having the force of law, or the construction of a document affecting the merits of the case shall arise, on which the Court trying such suit shall entertain reasonable doubts, the Court may, either of its own motion or on the application of either of the parties to the suit, draw up a statement of the case and submit such statement, with its own opinion, for the decision of the Sudder Court.

This and the following rules cannot be commended as either logical or practical. They allow a Judge to solicit the "opinion" of a Superior Court on any point on which he may "entertain reasonable doubts;" yet they require him, unable, as he is assumed to be, to form an opinion, and occupied as his mind is with "doubts," to record one, with the "reasons" for it, and at the same time prohibit his giving effect to his "judgment."

The point referred must be supposed, from the rule which requires it to be heard by "two or more Judges" of

* The alterations in the law embodied in this and the following Sections, are opposed to two general principles of this Code. They imply: 1*st*, that uniformity of decisions is unnecessary, where the suits are for an amount less than 500 Rs.; and 2*d*, that, in such cases, special appeals may be received and tried upon the certificates of the judges who decided the regular appeals from the original decisions. The opinions of the Select Committee who reported on the draft of this Code, was very decisively expressed on those two points. As to the first they said: "We are of opinion that an ultimate appeal upon matters of law is expedient, if not essential, to promote uniformity in the rule of decision." On the second point they observe: "It seems to us to be inexpedient to confine this appeal, as is proposed, to cases in which the Judge may think fit to certify. The result in practice would be that, in different districts, the numbers of such appeals would vary with the dispositions of the Judges, instead of bearing some proportion to the number and complexity of the questions of law determined."

These alterations have caused some discrepancies in the law, that cannot but cause embarrassment.

1. From certain suits, for amounts under 500 Rs. decided by the Small Cause Courts, there is no appeal.

But those Courts may refer to the High Court "any question of law, or usage having the force of law, or the construction of a document."

2. From the same description of suits, if tried by other Mofussil Judges, regular appeals will lie, but no special appeals.

But the Judges may make similar references for the opinion of the High Court.

3. If the suits, of amount exceeding 100 Rs., have been tried by Collectors or others, under Act X. of 1859, there may be both regular and special appeals.

4. For paupers, there is neither regular nor special appeal, except at the discretion of the Judge, on a perusal of a summary of his grounds.

the Superior Court, to be of great moment; while the direction given to the subordinate Judge, to record *any* opinion *pro formâ*, which is ultimately liable to be superseded by the decision of the Superior Court, as clearly implies the contrary.

SECTION 372 *e*.

[Section 29, Act XXIII. of 1861.]

Court may pass decree contingent upon the opinion of the Sudder Court, pending which execution not to issue.

The Court may proceed in the case notwithstanding a reference to the Sudder Court, and may pass a decree contingent upon the opinion of the Sudder Court on the point referred; but no execution shall be issued in any case in which a reference shall be made to the Sudder Court until the receipt of the order of that Court.

SECTION 372 *d*.

[Section 30, Act XXIII. of 1861.]

Two or more Judges of Sudder Court to decide cases referred.

Cases referred for the opinion of the Sudder Court shall be dealt with by two or more Judges of that Court.

This rule must be regarded as subject to Section 13 of 24 and 25 Victoria, chapter 104, which allows one or more Judges, or Division Courts constituted by two or more Judges, of the High Court, to exercise both original and appellate jurisdiction.

SECTION 372 *e*.

[Section 31, Act XXIII. of 1861.]

Sudder Court to fix an early day for the hearing of the case. Proclamation thereof.

The Sudder Court shall fix an early day for the hearing of the case, and shall notify the same by a proclamation to be fixed up in the Court-house of that Court.

SECTION 372 *f*.

[Section 32, Act XXIII. of 1861.]

Parties may appear and be heard in person or by pleader.

The parties to the case may appear and be heard in the Sudder Court in person or by pleader.

This provision renders the reference really an appeal. Hence there appears no reason why the lower appellate Court should not be left to pass its decision, and the party dissatisfied therewith to prefer a special appeal therefrom,

without being dependent on the pleasure of that Court, which is likely to be generally against reference.

SECTION 372 *g*.

[Section 33, Act XXIII. of 1861.]

Decision of Sudder Court how to be transmitted.

The Sudder Court, when it has heard and considered the case, shall transmit a copy of its judgment under the seal of the Court and the signature of the Register, to the Court by which the reference was made; and such Court shall, on the receipt thereof, proceed to dispose of the case conformably to the decision of the Sudder Court.

"Dispose of the case conformably to the decision of the Sudder Court." By a previous Section (372 *c*) the lower Appellate Court must have already decided the appeal. The words "dispose of the case," in this, are consequently to be understood to signify that that decision is either to be modified or executed, according as it may differ from or agree with the superior Court's judgment. It would have been best, under the circumstances, to direct that the lower Appellate Court should, when it makes a reference, abstain from passing a decree, seeing that such decree neither expresses his "judgment," nor is supported by "reasons" convincing to his mind, and is in fact not to be acted upon.

SECTION 372 *h*.

[Section 34, Act XXIII. of 1861.]

Costs of reference to Sudder Court.

Costs, if any, consequent on the reference of a case for the opinion of the Sudder Court, shall be costs in the suit.

SECTION 372 *i*.

[Section 35, Act XXIII. of 1861.]

Sudder Court may call for record of lower Appellate Court, and set aside its decision, though no appeal shall lie to the Sudder Court.

The Sudder Court may call for the record of any case, decided on appeal by any subordinate Court, in which no further appeal shall lie to the Sudder Court, if such subordinate Court shall appear, in hearing the appeal, to have exercised a jurisdiction not vested in it by law; and the Sudder Court may set aside the decision passed on appeal in such case by the subordinate Court, or may pass such other order in the case as to such Sudder Court may seem right.

This Section provides a remedy for any flagrant violation of the rules of equity and good conscience, which, under the previous system, would have been brought before the superior Court, in due course, by means of special appeal.

It is similar to the provision which authorised the Nizamut Adawlut to report, to the Government, instances of signal injustice, in miscellaneous criminal cases, in which there was no appeal to that Court. If there be a necessity for this rule, the tendency of which is to create a presumption, that the Judges of the lower Appellate Courts are inferior even to those of the Small Cause Courts, so far at least as regards suits cognizable by the latter, it would be preferable, on the principle of Section 25 of the Charter, with regard to criminal trials, to allow special appeals from their decisions, in all cases in which two barristers or vakeels may certify that there has been a failure of justice. It is obvious that, in ordinary cases, or where the aggrieved party does not possess very great resources, advantage can rarely be taken of this rule, especially as the exercise of an extraordinary power of interference, like this, will quite depend on the temper of the Judges of the superior Court, as well as on other circumstances unconnected with the merits of the case.

It would be suitable to the nature of the Small Cause Courts to endow the superior Court with such inquisitorial powers over their proceedings, though seldom likely to be exercised.

Section 373.

The application* for the admission of a special appeal shall be presented in the Sudder Court, within the period prescribed for the presentation of a memorandum of appeal, and shall be accompanied by copies† of the judgments and decrees of the lower Appellate Court and of the Court of first instance. The application shall be written on a stampt paper of the value prescribed for regular appeals; but if the applicant be unable to pay for the stamps required for the prosecution of the appeal, the Sudder Court may admit him to appeal as a pauper, subject to all the rules contained in Chapter IX., in respect to appeals from decrees *in formâ pauperis*, in so far as the same may be applicable.

Application how and when to be presented to the Sudder Court.

Value of stamp, unless the applicant be a pauper.

It is necessary under this Section to file, with the application of special appeal, the judgments and decrees of both the lower Courts. The Madras Sudder Court's ruling, of the 1st October 1860, is to this effect. The time for obtain-

* Though special appeals have been placed on the footing of regular appeals, that is, are "admitted as matters of course, whether there be grounds for a second appeal or not, the term "application," though unmeaning, continues to be used.

† As before noticed, but one copy of the judgment and decree of each Court is intended.

ing the copies of decrees should be deducted in the calculation of the time for filing applications of special appeal under the terms of Section 333.

The Calcutta Sudder Court held, 16th April 1860, that the Court have no power to extend the *prescribed* period of appeal.

Held by the Bombay Sudder Court, 15th February 1860: "A case having been remanded in special appeal for re-trial, another special appeal was preferred against the new judgment of the lower Court, and with it were presented copies of the judgment and decree given subsequently to the remand, but no copies of the decrees passed in the case before it was remanded. The Court held that copies of the judgment and decree appealed against, and of the judgment and decree of the original Court therein disposed of, were the only copies of judgments and decrees which the law require to be presented with the application."

Held by the Bombay Sudder Court, 15th February 1860: "An applicant for the admission of a special appeal is not required to produce, with his application, copies of English minutes recorded in the case by the Courts below, previously to January 1st 1860, in accordance with Act XII. of 1843, and Act XXXIII. of 1854."

SECTION 374.

Form of application.

The application shall set forth concisely* the grounds of objection to the decision appealed against, without argument or narrative, and such grounds shall be numbered consecutively. The applicant shall not, without the leave of the Court, be heard in support of any other ground of objection; but the determination of the Court may be upon any ground on which a special appeal would lie.

The appellant may, with the permission of the Court, raise other objections than are contained in his application; and the Court may take up any point on which a special appeal may lie. These provisions are similar to those contained in Clause 2, Section 10, Act XVI. of 1853.

Held by the Calcutta Sudder Court, in the case of Kishenchunder Darogah *v.* Mosharuff Ali, decided 8th February 1862, that, on the special appeal having been rejected, the special respondent, unless he proceeded according to this Section, had no right, on the analogy of Section 348,

* Section 334, at this place, has the words: "and under distinct heads," doubtless omitted from oversight.

regarding appeals, to "take any objection to the decision of the lower (Appellate) Court." But see the remarks under Section 348, the precedent of the 4th September 1862, cited in the note, and the directions in the latter part of Section 375, for assimilating the proceedings in special and regular appeals.

Held by the Bombay Sudder Court, 31st October 1860: "Every party presenting an application for the admission of a special appeal, must produce authenticated copies of all papers requisite to support the grounds of objection taken therein to the decree of the lower Court; and objections not so supported will be held untenable. It is to be understood that the Court will not, as heretofore, send for such papers."

Held by the Bombay Sudder Court, 17th November 1860: "Vakalutnamas may be received and recorded, from persons named as respondents in applications for the admission of special appeals, presented and filed but not yet registered."

The Bombay Sudder Court, directed, 12th December 1860, that all applications for the admission of special appeals be drawn up in the vernacular, in accordance with the following form:—

In the Court of Sudder Dewanee Adawlut.

No. on the File.
No. of Appeal in the Zillah Court.
Applicant.
Opposite party.

The grounds of objection to the decision appealed against are:

1*st.*—That it is *contrary to law*, in that, &c.

2*nd.*—That it is *contrary to usage* having the force of law, in that, &c.

3*rd.*—That there has been a $\left\{\frac{\textit{substantial error}}{\textit{defect}}\right\}$ in law in the $\left\{\frac{\textit{procedure}}{\textit{investigation}}\right\}$ of the case, and which may have produced $\left\{\frac{\textit{error}}{\textit{defect}}\right\}$ in the decision of the case on its merits, in that, &c.

Dated ——— Pleader.

SECTION 375.

[Repealed by Section 1, Act XXIII. of 1861, and re-enacted by Section 25, as follows:]

Application for the admission of a special appeal informally drawn up, how to be dealt with.

If the application* for the admission of a special appeal be not written on a stampt paper of the prescribed value,* or if it be not drawn up in the manner laid down in Section 374 of Act VIII. of 1859,* or if it do not state any ground on which a special appeal will lie under the provisions of Section 372 of the said Act, * the Court may reject the application, or may return it to the party for the purpose of being corrected. The order for rejecting the application or for returning it to the party may be passed by a single Judge of the Court.† When the application is correctly drawn up, it shall be registered in a book to be kept for that purpose, which shall be in the form contained in the Schedule D. of the said Act; and the case shall proceed in all other respects as a regular appeal, and shall be subject to all the rules hereinbefore provided for such appeals, so far as the same may be applicable.

The rules of practice issued by the Calcutta Sudder Court contain the procedure to be followed in the disposal of special appeal applications under this Code.

Under the former proceeding a special appeal could not be admitted, until two Judges decided that the grounds urged for the admission of it were sufficient. On admission, notice was issued to the respondent, and the appeal was brought up for trial. This Code allowed it to be entered on the books, if the application for its admission were drawn up in the manner prescribed. The Calcutta and Agra Courts had also held, in communication, that the summary power of rejection or return of a special appeal could be exercised on the ground of incorrectness of form only; and that no inquiry into the groundless nature of the objections could be made but after the registration of the special appeal and at the regular hearing. But many applications were presented, which, notwithstanding the restrictive character of the law, showed no ground on which the appeals were admissible.‡ Hence this amended Section.

To prevent the abuse, without reviving the abrogated practice of two Judges hearing the application for the admission of special appeals, the clause, authorising the rejection

* The two clauses within asterisks were not in the original Section (375,) which stated in general terms: "If the application be not drawn up in the manner hereinbefore prescribed," &c.

† The original Section did not contain this sentence.

‡ This disregard of the law was supposed to be in most cases wilful, with the object of gaining time, or, by obtaining an order to stay the execution of the decree, to force the successful party into a compromise.

of the application by a single Judge, has been inserted in the amended Section.

In the absence of that preliminary inquiry, the phrase "application for the admission of a special appeal," is quite inapplicable. Even with this modification of the procedure, it would be preferable to substitute for the above the words "memorandum of special appeal," as in the case of regular appeals. The words in the form of memorandum, in Section 335,—"A. B. appeals to the High Court, &c., for the *following reasons*, viz.," would probably necessitate the mention of the *grounds* of special appeal.

"The case shall proceed in all other respects as a regular appeal," &c.—Under the provisions of this Section the Sudder Court could not decide a case which was before it in special appeal, on its merits, without remanding it to the lower Court, even though the evidence on the record might be so complete as to admit of a decision thereon. The Sudder Court could only decide a special appeal on certain points of law, as provided in Section 372. Where the evidence is complete as to these points, the Court can now decide them without a remand.

Held by the Bombay Sudder Court, 28th June 1860, that the rules for staying execution of decrees under regular appeal should be observed in cases where special appeals are preferred.

Held by the Bombay Sudder Court, 31st October 1860: "Applications for the admission of special appeals, when an order for registry is given by the Judges, will henceforward be registered on security and the cost of serving notice on the respondent being furnished; provided that both are furnished within sixty days from the date of the order for registry."

CHAPTER XI.

REVIEW OF JUDGMENT.

SECTION 376.

Review of judgment.

Any person, considering himself aggrieved by a decree of a Court of original jurisdiction, from which no appeal shall have been preferred to a Superior Court—or by a decree of a District Court in appeal, from which no special appeal shall have been admitted by the Sudder Court—or by a decree of the Sudder Court, from which either no appeal may have been preferred to Her Majesty in Council, or, an appeal having been preferred, no proceedings in the suit have been transmitted to Her Majesty in Council—and who, from the discovery of new matter of evidence which was not within his knowledge, or could not be adduced by him at the time when such decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree.

On discovery of new evidence, &c.

The subsidiary rules for carrying out the provisions of this Chapter are given in the rules of practice framed by the Calcutta Sudder Court, which, of course, will be followed by the lower Appellate Courts as far as applicable. The rules for reviewing the judgment of a competent Court, and the grounds on which judgments may be reviewed, remain almost substantively the same as before. One material difference is, that all Courts below the rank of the Sudder Court are empowered by this Code to review their own judgments, without the reference to the Superior Court which was required by Clause 2, Section 4, Regulation XXVI. of 1814, of the Bengal Code.

As the procedure in the disposal of special appeals is the same as that regarding regular appeals, and there is to be no separate admission of a special appeal on certified points before the final determination of the appeal itself, the words "from which no special appeal shall have been admitted" mean the admission on the file of the Court as provided in Sections 374 and 375.

No interference with a finding of facts in the judgment of the lower Appellate Court, where a special appeal has been preferred against it, is permitted; and although such appeals lie only on legal points, the policy of the law is not to allow a party to carry on a double litigation and proceed simultaneously against his adversary in two Courts for the same cause of action. This is generally in conformity to the former practice of the Courts.

The Calcutta Sudder Court ruled, 22nd June 1860, that an application for review of judgment may be taken up and disposed of, although an appeal from the same judgment have been subsequently preferred.

The Madras Sudder Court held, 25th February 1860, that the rules under this Chapter do not apply to the review of *orders* passed on miscellaneous petitions, and written applications of the kind should therefore be rejected; but that it is in the discretion of the Courts, on the verbal motion of one of the parties, to amend any material error in its order, provided that, if such amendment be calculated to prejudice the other party, a notice be first issued to such party to show cause why the order should not be amended.

The same Court held, 29th March 1860, that the lower Courts need not apply to the Sudder Court for permission to review their judgments; and that, in cases where the error cannot affect either party, the Court which passed the decree may, of its own motion, review its judgment, without any application from the parties.

Held by the Madras Sudder Court, 24th April 1861: "A Judge, having once passed an order on an application for execution, has no authority to re-investigate the case and pass a second order directly opposed to the one first made. The ruling of the Sudder Court on this Section, under date the 1st October 1860, merely provides for the correction of errors or omissions arising from inadvertence or an oversight; no order can be *reversed* by the Judge by whom it was passed."

SECTION 377.

Within what time and on what stamp the application should be made.

The application shall be made within ninety days from the date of the decree, unless the party preferring the same shall be able to show just and reasonable cause, to the satisfaction of the Court, for not having preferred such application within the limited period. If the application be made within the period abovementioned, it shall be written on the stampt paper prescribed for petitions to the Court where a stamp is required; but if made after the expiration of that period, it shall be written on the stampt paper prescribed for plaints.

There is no deduction of the time occupied in obtaining a copy of the decree to be reviewed. The application must be filed within 90 days from the date of the decree. Looking, perhaps, to the fact that the judgment sought to be reviewed is that of the Court to which the application is made,

the law has not made it imperative that copies of the judgment and decree be filed with the application. It will be seen, however, from the rules of practice adopted by the Sudder Court, that such copies are necessary: although not distinctly mentioned in those rules, it is implied that the copies should be on stampt paper.

"It shall be on the stampt paper prescribed for plaints," in other words it shall be on the full stamp required for plaints or appeals, as the case may be. Under the existing stamp law there is no difference in the value of stamps for plaints and appeals. Where, however, the suit was for an amount of which a portion only is denied to the applicant, he has to file his application for review of judgment on a stamp covering the amount not decreed.

SECTION 378.

If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application; but if it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review; and its order in either case, whether for rejecting the application or granting the review, shall be final. Provided that no review of judgment shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree of which a review is solicited.

The order of the Court for granting or refusing the review is final.

Proviso for notice to the opposite party.

It is not imperative under this Code to summon the opposite party before hearing the application for review of judgment. Such application may be rejected in his absence. But it cannot be admitted without summoning him. Where there are on the hearing of the application *primâ facie* grounds, notice is to be given to the opposite party. In the rules of practice adopted by the Sudder Court, the issue of a notice is prescribed in every case before the hearing of an application. This is probably to avoid a two-fold hearing of an application in case of admission.

Held by the Madras Sudder Court, 21st January 1861: "A Civil Judge is precluded from taking any cognizance of an appeal from the order of a District Moonsiff declining to review his judgment, such order being final."

SECTION 379.

Application for a review in the Sudder Court to be heard by the Judge or Judges who passed the decree, unless, &c.

If the Court, to which the application for a review of its judgment has been presented, be a Court consisting of two or more Judges, whenever the Judge or Judges who may have passed the decree,—or, if the decree have been passed by two or more Judges, when any of such Judges,—shall continue attached to the Court at the time when the application for a review is presented, and shall not be precluded by absence or other cause, for a period of six months after the application, from considering the judgment to which the application refers, it shall not be competent to any other Judge or Judges of the same Court to enter upon a consideration of the merits of the application and record an order or opinion thereon.

This Section applies to the Sudder Court, which consists of more than one Judge. It is generally similar in principle to Regulation II. of 1825, of the Bengal Code.

SECTION 380.

Procedure on application for a review being granted.

When an application for a review of judgment is granted, a note thereof shall be made in the Register of suits or appeals, (as the case may be;) and the Court shall give such order in regard to the re-hearing of the suit as it may deem proper in the circumstances of the case.

CHAPTER XII.

MISCELLANEOUS.

SECTION 381.

[Repealed by Section 1, Act XXIII. of 1861, and re-enacted by Section 40, as follows.]

Sudder Court to make general rules for regulating proceedings, &c. which are to be published in the Official Gazette.

The Sudder Court shall have power to make and issue general rules—for regulating the practice and proceedings of that Court and the Courts subordinate to it,—and also to frame forms for every proceeding in the said Courts for which it shall think necessary that a form be provided,—for keeping all books, entries, and accounts to be kept by the officers,*—and for the preparation and submission of any statements to be prepared and submitted by such Courts,*—and from time to time to alter any such rule or form: provided that such rules and forms be not inconsistent with the provisions of this Act or of any other law in force. Any rules framed under this Section shall be published in the Official Gazette.

* The words within asterisks were not in the original Section (381).

This Section empowered the Sudder Courts to make and issue rules for regulating the practice and proceedings of the subordinate Civil Courts, as well as their own. The power of the Sudder Courts to frame subsidiary rules for regulating their practice and carrying out the provisions of this Code, were not defined in the original Section (381). Act XVII. of 1841, under which the Sudder Courts were empowered to frame such rules, subject to the approval of the Supreme Government, having been repealed, it became necessary to modify that Section as above. The rules, however, whether provided for the Sudder or the subordinate Courts, must not be inconsistent with the provisions of this Code or any other law, and must be published in the Official Gazettes, including, it is to be supposed, the vernacular. This rule regarding publication was not to be found either in Act XVII. of 1841, or in the original Section (381) of this Code. The whole of this Section must be considered as abrogated by Sections 13—15 of the statute 24 and 25 Victoria, Chapter 104, which empowers the High Court, "subject to any laws or regulations which may be made by the Governor-General in Council," to frame "its own rules," and, with the sanction of the Governor-General in Council, and, in the other Presidencies, the Local Governments, to frame rules of practice, tables of fees, &c., for the subordinate Courts. It is not therein directed that the rules framed and sanctioned shall be published in the Official Gazettes; but it is probable that the High Court will deem it proper to observe the rule enjoined in this and other Sections of this Code.

Section 381 *a*.

(Section 2, Act L. of 1860.*)

Sudder Courts to prepare and publish an annual list of holidays to be observed.

Subject to such orders as may from time to time be issued by the Governor-General of India in Council or by the Local Government, the Courts of Sudder Dewanny in the Presidency aforesaid shall prepare a list of days to be observed, in each year, as close holidays, in such Courts and in the Courts respectively subordinate to them; and such list shall be ordinarily published at the commencement of each year in the Official Gazette of the Presidency or place in which each Sudder Court is held.

* This Act, styled "An Act to amend the law relating to vacations in the Civil Courts within the Presidency of Fort William in Bengal," repeals Sections 2 and 3 of Regulation III. 1798, of the Bengal Code, Section 13 of Regulation VIII. 1805, of the same Code, and Section 10 of Regulation I. 1806, of the same Code.

SECTION 382.

Except so far as relates to the examination of witnesses under commission and to the execution of decrees out of the jurisdiction of the Courts by which they were passed, this Act shall not extend to any suit instituted [in any Court of Judicature established by Royal Charter or]* in any Court for the more easy recovery of small debts and demands in Calcutta, Madras, and Bombay.

Act not to extend, except in certain cases, to Supreme and Presidency Small Cause Courts.

See remarks on Section 1.

SECTION 383.

Nothing in this Act shall be held to alter or affect the jurisdiction or procedure, in civil cases, of village moonsiffs or village or district punchayets under the provisions of the Madras Code; or the jurisdiction or procedure of Military Courts of Request; or the jurisdiction or procedure of a single Officer duly authorised and appointed, under the rules in force in the Presidencies of Fort St. George and Bombay respectively, for the trial of small suits in Military bazars at cantonments and stations occupied by the troops of those Presidencies respectively; or by punchayets in regard to suits against Military persons, according to the rules in force under the Presidency of Fort St. George.

Saving of jurisdiction and procedure of village moonsiffs and village and district punchayets in Madras—

of Military Courts of Request—

of single Officers appointed to try small suits in Madras and Bombay—

and of Military punchayets in Madras.

SECTION 384.

Nothing in this Act shall be held to affect the jurisdiction exercised by certain jagheerdars and other authorities invested with powers under the provisions of Regulation XIII. 1830, of the Bombay Code, (*for vesting certain jagheerdars, surinjameedars, and enamdars with the power of deciding suits within the boundaries of their respective estates*), and Act XV. of 1840, (*for extending Regulations XV. 1827 and XIII. 1830 of the Bombay Code to the Agents of Foreign Sovereigns*), or their procedure in the exercise of such jurisdiction; or to affect suits instituted under Regulation XI. 1816 of the Bengal Code, (*for receiving, trying, and deciding claims to the right of inheritance or succession in certain tributary estates in Zillah Cuttack*), or cases of the nature defined in Regulation XXIX. 1827, (*for bringing under the operation of the Regulations the Bombay Territories in the Dekkan and Khandesh*), Regulation VII. 1830, (*for bringing under the operation of the Regulations the territories comprised in the Southern Mahratta country*), Regulations I. and XVI. 1831 of the Bombay Code, (*for extending the jurisdiction of the Agent of Government in the Dekkan and Khandesh and of the Political Agent in the Southern Mahratta country over suits in which certain privileged persons are concerned*), Act XIX of 1835, (*relating to the jurisdiction and authority of the Assistant to the Agent for Sirdars in the Dekkan*), Act XIII. of 1842, (*to enable the holders of revenue which has been*

Saving of certain special or local laws.

* The words within brackets are become inapplicable, by the establishment of the High Court.

alienated to them by the State to collect that revenue within the Presidency of Bombay), except that such suits and cases and the regular and special appeals to the Civil Courts allowed therein, shall be received, heard, and determined under the rules laid down in this Act, unless where those rules are inconsistent with any specific provisions contained in the Regulations and Acts above quoted.

To what extent this Act applies to them.

Where, in the Regulations and Acts cited in this Section, provision is made for the trial of suits by certain authorities, and for the trial of appeals, or special appeals, by the Civil Court, the procedure therein should be according to this Act, unless it be inconsistent with the specific provisions contained in those Regulations and Acts, in which case it will be conducted according to those specific provisions and not according to this Code.

The preceding three Sections specify the Courts and cases exempted from the Act. The Small Cause Courts in Calcutta, Madras, and Bombay are, however, to execute the decrees of the Mofussil Courts and examine witnesses when evidence is ordered to be taken by commission under the provisions of Sections 176, 284, and 382 of this Code.

The Bombay Sudder Court stated, 17th February 1860, in reply to a question, that this Section applies the new procedure to the Courts of the Agent for Sirdars in the Dekkan and the Assistant Agent, when it is not inconsistent with the special local laws constituting their jurisdiction, as specified in the last five lines of the Clause; and that the first part of the Section seemed to exclude the Civil Courts of the jagheerdars and Agents of Foreign Sovereigns from the operation of the Act, there being a stop between the former and the latter part of the Section, which saves the otherwise apparent inconsistency.

Section 385.

This Act shall not take effect in any part of the territories not subject to the general Regulations of Bengal, Madras, and Bombay, until the same shall be extended thereto by the Governor-General of India in Council, or by the Local Government to which such territory is subordinate, and notified in the Gazette.

Act not to take effect in places not subject to the general Regulations until extended thereto.

Section 385 *a*.

[Section 39, Act XXIII. of 1861.]

When, under the provisions of Section 385 of the said Act, the Act is extended to any part of the territories not subject to the general Regulations of Bengal, Madras, and Bombay, it shall be lawful for the Government to

Extension of Act to Non-Regulation Provinces.

which the territory is subordinate to declare, that the Act shall take effect therein subject to any restriction, limitation, or proviso which it may think proper. In such case the restriction, limitation, or proviso shall be inserted in the declaration or notification of such extension. When the Act is extended by the Local Government to any territory subordinate to such Government, and such extension is made subject to any restriction, limitation, or proviso, the previous sanction of the Governor-General of India in Council shall be requisite.

SECTION 386.

Interpretation.

The following words and expressions in this Act shall have the meaning hereby assigned to them, unless there be something in the subject or context repugnant to such construction, that is to say,*

Number.

Words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number.

Gender.

Words importing the masculine gender shall include females.

"District" and "District Court."

The local jurisdiction of a principal Civil Court of original jurisdiction shall be deemed a district for the purposes of this Act; and the words "District Court" shall mean such Court.

"Sudder Court."

In any part of the British territories in India to which this Act may be extended under the provisions of Section 385, the expression "Sudder Court" shall be deemed to include the highest Civil Court of appeal in such part of the said territories.

SECTION 386 *a*.

[Section 41, Act XXIII. of 1861.]

"Pleader."

The word "pleader" as used in this Act† shall include the words "counsel" and "advocate."

SECTION 387.

Commencement of operation of Act.

This Act shall come into operation in the Presidency of Bengal from the 1st day of July 1859, and in the Presidencies of Madras and Bombay from the 1st day of January 1860, or from such earlier day as the Local Governments in those Presidencies respectively shall fix and shall publicly notify in

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* Lord Brougham has adverted, in strong terms, to "the havoc made by the new and pernicious insertion of the Interpretation Clause, which makes draftsmen (of laws) doubly careless, and introduces doubts of its own though intended to remove all doubts." His remark on "the egregious absurdity" of ordaining that "the meaning affixed to words is to hold *unless where* the context points otherwise," or where "the *subject* or context is repugnant," although "no definition be given of *subject*," is applicable to the initial words in particular, and generally to the whole of this Section. "Then the scissors are used with Interpretation Clauses as well as others, and with the wonted result." On such authority it may be safely said that this Section might have been advantageously omitted.

† This Section was inserted with a view to obviate mistakes. With reference to Section 388 *d*, *post*, the interpretation is not to be restricted to "this Act," but applies, to the whole of this Code, subject to the subsequent provisions of Sections 7—10 of the Charter of the High Court, *which see*.

the Gazette of the Presidency three months at least before the date so fixed. But if, in any suit pending at the time when this Act shall come into operation, it shall appear to the Court that the application of any provision of this Act would deprive any party to the suit of any right in reference to the procedure of the suit, whether of appeal or otherwise, which but for the passing of this Act would have belonged to him, the Court shall proceed according to the law in force before this Act takes effect.

Pending suits.

From the date of the operation of this Code as fixed in this Section, its provisions are to be applicable to all pending suits and appeals; but when such application may tend to deprive any party of a *positive* right, in reference to the procedure of the suit or appeal, which he enjoyed under the former law, the Court must proceed according to that law. It was till lately doubtful what was meant by the Legislature by the use of the general term "right" mentioned in this Section, *i. e.* whether it meant any positive right or those remote and incidental advantages which can hardly be said to be rights, and are at best of the nature of imperfect rights. In regard to cases like the following there was no contention. This Code allows a respondent, on the appeal of his adversary, to raise any point he may have lost in the lower Court, without making a formal appeal on that point. This he could not do without such appeal under the former law. In an appeal filed before this Code came into operation, but taken up in the course of its operation, the respondent should not be allowed to plead new points without a separate appeal, as that would deprive the appellant of a right, which the former law gave him, to consider the decision on those points as final. So in numerous cases, for instance, in pauper suits and execution of decrees decided before the operation of this Code, where a right of appeal was given to parties under the former law, the Court cannot refuse to allow such appeal, after the operation of this Code, because they are not permitted by it. So, in regard to the applications for special appeal filed before this Act, the Court cannot dispose of them on the limited grounds provided by it. It was, however, contended by some that the term included a wider range of rights and privileges. It was said that, where an appeal to the Sudder Court, in a suit decided before the 1st of July, in the Bengal Presidency, was not made within six weeks as required by Act XV. of 1853, (though made in time under the Code,) the respondent had a right to have the appeal

dismissed as filed beyond time. So also, in disposing of the applications for special appeal filed before that date, it was maintained that the provision under this Code, for assimilating the procedure in special appeals to that applicable to regular appeals, need not be enforced, as the respondents in those special appeals had a right to have them disposed of under the former law without being summoned or the records sent for. It has, however, now been settled that the word *right* used in this Section refers to positive rights of the nature illustrated above.

"59. Where appeals are preferred from decisions passed before the 1st of July, and appellants would be deprived of any right in reference to the procedure of the suit by the operation of Act VIII. of 1859, the appeal must be heard under the old law. A similar rule applies to the original trial of all suits pending when this Act came into operation."—*S. C. Cir. Or., 29th July* 1859.

The Calcutta Sudder Court held, 28th November 1859, that a suit must be said to be pending within the meaning of this Section, if, when the Code came into operation, any thing remained to be done, which might have been done under the old law. Thus, where a petition for review remained to be filed, the petitioner, though beyond the ninety days prescribed by the new law, in filing his petition, was entitled to ask the Court to hear it within the period of three months allowed by the old law, that he might not be deprived of a right which, but for the passing of the Code, he would have possessed.

Certain appeals were preferred before the enactment of this Code against orders passed in execution of decrees. As the application of the provisions of this Code to the case would preclude the hearing of the appeals, the Calcutta Sudder Court held, 5th December 1859, that the old law must govern the case.

The same Court ruled, 5th December 1859, that an order, rejecting an application to sue as a pauper, passed since the Code's coming into operation, must be governed by the Code, and is consequently final.

See the same Court's decisions of the 7th and 30th January 1860, noted under Sections 116 and 351.

Held by the Bombay Sudder Court, 7th November 1860, that the words "any suit pending," as used in this Section, apply only to those cases in which the time limited

for preferring an appeal against the last decree passed therein, shall not have elapsed, but not to miscellaneous orders passed after decree in any instance, an appeal against such orders being barred by Section 361.

A question was proposed whether, in a suit pending at the time of this Code's coming into operation, it would be best to allow the pleaders to choose the procedure they would abide by in all the future stages of the suit, or to proceed under the new procedure generally, reverting to the old procedure where any right might be lost. The Madras Sudder Court held, on the 13th July 1860, that it would be for the judge to decide, under all the circumstances of the case, which procedure should be followed at any stage of such a suit, upon a question being raised by the parties; but that it must be borne in mind that the new procedure is binding upon the Court, unless it be clearly shown that any of its provisions would deprive either party of any right which he would otherwise have possessed.

Held by the Madras Sudder Court, 16th March 1861: "If a plaint presented before Act VIII. of 1859 came into operation, be rejected after that date, without the merits of the case being entered upon, the plaintiff is entitled to prefer a summary appeal from the order under the provisions of the old law."

Held by the Agra Sudder Court, in the case of Ruttun Chund *v.* Lalla Ajaib Lall and others, decided 28th February 1861, that in an appeal, filed before this Act came into operation, but taken up subsequently, the respondent should not be allowed, without a separate appeal, to plead any points, not included in the appeal, as that would deprive the appellant of a right, which the former law gave him, to consider the decision on those points as final.

Held by the Bombay Sudder Court, 14th July 1860: "In appeals decided subsequently to January 1st 1860, the judgments and decrees should be drawn up separately, in conformity with this Code."

Section 388.

Where Act comes into operation, procedure of Civil Courts to be regulated by it, exceptions excepted.

From and after the time when this Act shall come into operation in any part of the British territories in India, the procedure of the Civil Courts in such part of the said territories shall be regulated by this Act, and, except as otherwise provided by this Act, by no other Law or Regulation.

This virtually rescinds the whole body of former Regulations and Acts relating to the procedure of suits in the Civil Courts. That procedure is to be regulated by this Code only. To avoid doubts and difficulties arising from so general a rescission of laws enacted during a period of more than half a century, an Act (X. of 1861, to be found in the Appendix) has been passed, enumerating the Regulations and Acts that are repealed.

SECTION 388 *a*.

[Section 38, Act XXIII. of 1861.]

Procedure prescribed by Act VIII. of 1859, to be followed in all future miscellaneous cases and proceedings.

The procedure prescribed by Act VIII. of 1859 shall be followed, as far as it can be, in all miscellaneous cases and proceedings which, after the passing of this Act, shall be instituted in any Court.

SECTION 388 *b*.

[Section 42, Act XXIII. of 1861.]

Short Title.

Act VIII. of 1859 shall be called the Code of Civil Procedure.

SECTION 388 *c*.

[Section 43, Act XXIII. of 1861.]

Sections 16 to 22 of this Act when to take effect.

Sections 16, 17, 18, 19, 20, 21, and 22 of this Act shall not take effect until the date on which the Indian Penal Code and the Code of Criminal Procedure shall come into operation.*

SECTION 388 *d*.

[Section 44, Act XXIII. of 1861.]

Construction.

This Act shall be read and taken as part of Act VIII. of 1859.

* The 1st January 1862.

Schedules referred to in Act VIII. of 1859.

SCHEDULE A.

COURT of the of holden at

REGISTER OF CIVIL SUITS in the year 18 .

Date of presentation of plaint.	No. of Suit.	PLAINTIFF.			DEFENDANT.			CLAIM.			APPEARANCE.			JUDGMENT.			APPEAL.		EXECUTION.				RETURN OF EXECUTION.		
		Name.	Description.	Place of Abode.	Name.	Description.	Place of Abode.	Particulars.	Amount or value.	When the Cause of Action accrued.	Day for Parties to appear.	Plaintiff.	Defendant.	Date.	For whom.	For what, or amount.	Date of Appeal.	Judgment in Appeal.	Date of Application.	Date of Order.	Against whom.	For what, and Amount of Money.	Amount of Costs.	Amount paid into Court.	Arrested.	Minute of other Return than payment or arrest, and date of every Return.

SCHEDULE B.

No. of Suit.

In the Court of at

Plaintiff,
Defendant.

(Name, description, and address.)

Whereas [*here enter the name, description, and address of the plaintiff*] has instituted a suit in this Court against you [*here state the particulars of the claim as in the Register*]: you are hereby summoned to appear in this Court in person on the day of at in the forenoon [*if not specially required to appear in person, state—"in person or by a pleader of the Court duly instructed and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions"*] to answer the above-named plaintiff. [*If the summons be for the final disposal of the suit this further direction shall be added here; "and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce all your witnesses on that day:"*] and you are hereby required to take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence; and you will bring with you (or send by your agent) [*here mention any document the production of which may be required by the plaintiff*] which the plaintiff desires to inspect, and any document on which you intend to rely in support of your defence.

SCHEDULE C.

COURT at

REGISTER OF APPEALS from DECREES in the year 18 .

Date of Memorandum.	No. of Appeal.	APPELLANT.			RESPONDENT.			DECREE APPEALED FROM.				APPEARANCE.			JUDGMENT.		
		Name.	Description.	Place of Abode.	Name.	Description.	Place of Abode.	Of what Court.	No. of Original Suit.	Particulars.	Amount or Value.	Day for parties to appear.	Appellant.	Respondent.	Date.	Confirmed, reversed, or altered.	For what, or amount.

SCHEDULE D.

SUDDER COURT at

REGISTER OF SPECIAL APPEALS.

Date of Memorandum.	No. of Appeal.	APPELLANT.			RESPONDENT.			DECREE APPEALED FROM.				APPEARANCE.			JUDGMENT.		
		Name.	Description.	Place of Abode.	Name.	Description.	Place of Abode.	Of what Court.	No. of original Suit and of Appeal.	Particulars.	Amount or Value.	Day for Parties to appear.	Appellant.	Respondent.	Date.	Confirmed, reversed, or altered.	For what, or amount.

APPENDIX.

FORMS OF PLAINT.*

1. *Plaint in a suit on Bond.*

In the Court of the Moonsiff of Chuppye, Zillah Rajshahye.

Ramchunder Doss, of Kashaniparah, Thannah Nowabgunge, in the said district, monev lender, Plaintiff.

Abdool Alee Khan, of Godagari, silk merchant, Defendant.

Suit for payment of Rupees 300, balance due on a bond for Rs. 1000, dated 1st Cheyt 1257, and payable on the 1st Cheyt 1258, namely,

Principal	1000
Interest	400
	1400
Deduct amount paid ...	1100
Balance due	300

I, A. B., the Plaintiff (or I, C. D., on behalf of A. B. the plaintiff, as the case may be,) named in the above plaint, do declare that what is stated therein is true to the best of my information and belief.

2. *Plaint in suit for the Resumption of Land.*

In the Court of the Sudder Ameen of Zillah Rajshahye.

A. B, zemindar of pergunnah Z., zillah Rajshahye, Plaintiff.

C. D., talookdar of mouzah Y., pergunnah Z., zillah Rajshahye, Defendant.

Suit, under the provisions of Regulation II. of 1819, and Act VII. of 1862 of the Bengal Government, for the resumption of 54 beegahs of land in the mouzah of zillah Rajshahye, as per boundaries at foot, in the possession of the defendant and claimed by him as rent-free, of the estimated value of Rupees.

I, A. B., the plaintiff, &c., (as above.)

* These forms are after some prepared by Mr. L. S. Jackson, formerly Judge of Rajshahye, and now a Judge of the High Court.

3. *Plaint in suit for Assessment of Land.*

In the Court of the Moonsiff of Nattore, zillah Rajshahye.

Kirparam Doss, talookdar of mouzah Biswas, pergunnah Kunnyeram, zillah Rajshahye, Plaintiff.

Goberdhun Mundul, ryot, mouzah Biswas, pergunnah Kunnyeram, zillah Rajshahye, Defendant.

Suit for the assessment of 25 beegahs of land in mouzah Biswas, as per boundaries at foot, in the possession of the defendant, at the rate of Rupees per beegah, amounting to Rupees, from the date of notice served on the defendant.

I, A. B., the plaintiff., &c., (as above.)

4. *Plaint in suit for Damages.*

In the Court of the Principal Sudder Ameen, zillah Rajshahye.

Soobharam Mullick, zemindar of pergunnah A., zillah Rajshahye, Plaintiff.

Doorgachurn Singh, zemindar of Pergunnah B., zillah Rajshahye, Defendant.

Suit for damages for defamation of character and the injury done to the plaintiff, by a false statement contained in the defendant's petition, dated filed in the Court of the Judge of Rajshahye, by which the plaintiff was endamaged in the sum of Rupees.

I, A. B., the plaintiff, &c., (as above.)

5. *Plaint in suit for Possession of Land.*

In the Court of the Principal Sudder Ameen, Zillah Rajshahye.

A. B., of Burgachee, in thannah Godagari, zemindar, Plaintiff.

C. D. } zemindars, sons of G. H. deceased, also zemindar of Belwa,
E. F. } in thannah Bauleah, Defendants.

Suit for possession of the estate called Monirampore in the said zillah of Rajshahye, of which the sudder jumma is Rs. 1960, and estimated value Rs. 9,500, of which estate the plaintiff's father X. Y. was dispossessed by the defendants' father, the said G. H., on the 10th Bhadro 1249.

The plaintiff was an infant from the 16th Jeyt 1250, on which date his father died, until 14th Srabun 1260, whereby he was incapacitated from suing, and therefore now brings his suit in time.

I, A. B., the plaintiff, &c., (as above.)

6. *Plaint for Value of Goods sold.*

In the Court of the Moonsiff of Nattore, zillah Rajshahye.
Dookhecram Pall, of Buragunge, Nattore, shopkeeper, Plaintiff.
Mitterjeet Ojha, jemadar, of Rajbaree, Nattore, Defendant.

Suit for payment of 59 Rupees, on account of goods sold to defendant, on various dates between the 1st Bhadro and 15th Kartikh 1263, the price of which became payable on the 18th Poos 1263, as per account at foot, as acknowledged by the said defendant's signature.

I, A. B., plaintiff, &c., (as above.)

7. *Plaint in suit founded on Adoption.*

In the Court of the Principal Sudder Ameen of zillah Rajshahye.

Kasheenath Sandyal, zemindar of pergunnah Khangra, zillah Rajshahye, Plaintiff.

Doorgachurn Sandyal, zemindar of pergunnah Noabad, zillah Rajshahye, Defendant.

Suit for the possession of pergunnah Khangra, zillah Rajshahye, and 200 beegahs of land, as per boundaries at foot, and four houses and two gardens in the village of Sectaphul, pergunnah Rasbehar, the property of Anundkishore Sandyal, whose widow, Munmohinee Debea, adopted the plaintiff in due form, by virtue of a deed of permission from her husband, dated of which said property the plaintiff was dispossessed by the defendant on the (or the defendant refused to give the plaintiff possession, as the case may be.)

I, A. B., the plaintiff, &c., (as above.)

Plaintiff's Statement.

Anundkishore Sandyal, proprietor of the estates mentioned in the plaint, married Munmohinee Debea, and, being childless, executed a deed of permission, on the to his said wife, to adopt a suitable child according to the prescribed forms of Hindoo law, and had the deed registered, on the in the register's office at the sudder station of the district, and died on Munmohinee Debea, in pursuance of the said deed, took the plaintiff, being the second son of Ramkishore Sandyal, then of the age of four years, and caused the usual ceremonies of adoption to be performed on the The plaintiff lived with her ever since as the adopted son of the said Anundkishore Sandyal, and was so entitled to succeed to the estates of the deceased. The plaintiff came of age on the and on seeking to obtain possession of the said estates, the defendant refused, on various false pretences, to give him possession thereof. The plaintiff in consequence brings this suit.

I, A. B., the plaintiff, &c., (as above.)

[Same title.]

Defendant's Statement, including a Plea founded on the Law of Limitation.

The defendant is the son of Kistokishore Sandyal, uterine brother of Anundkishore Sandyal, the late proprietor of the estates described in the plaint, and as such the rightful heir, and succeeded to the estates of the deceased from being the date of the demise of the deceased.

The deceased, Anundkishore Sandyal,left no issue, and gave no deed of permission to his widow to adopt a son, and no adoption, as alleged by the plaintiff, took place.

The plaintiff was born on the and attained his year, on the the date above mentioned, and came of age on the from which last date to the date of the institution of this suit, years have elapsed, whereby his suit is beyond time.

I, C. D., the defendant, &c., (as above.)

FORM OF MEMORANDUM OF APPEAL AND GROUNDS OF OBJECTION.

(Name, &c., as in Register.) Plaintiff.
(Name, &c., as in Register.) Defendant.

[Name of Appellant] Plaintiff [or Defendant] above-named appeals to the Sudder Court at [or Zillah Court at as the case may be], against the decree of in the above suit dated the day of ; for the following reasons, namely :

First.—That the plaintiff's claim is barred by a former decision of the court of the judge (or the principal sudder ameen, as the case may be,) dated between the same parties and on the same subject.

Second.—The decision of the judge (or principal sudder ameen, as the case may be,) on the plea of limitation is wrong.

Third.—The finding of the lower court on the fact of the execution of the deed dated is contrary to the evidence.

Fourth.—The lower court has misinterpreted the deed (or decree, as the case may be,) dated

Fifth.—The lower court has failed to take into consideration the effect of the admission of the plaintiff (or defendant, as the case may be,) operating as an estoppel.

Sixth.—The lower court has failed to determine the question as to the genuineness of the receipt filed by the appellant.

FORM OF DECLARATION

To show cause why a party should not attend and give evidence.

In the Court of the Principal Sudder Ameen of Rajshahye.

[Title of the suit.]

I, A. B., plaintiff in this cause, say that I ought to be exempted from attending to give evidence, for the following reasons :

1.—That I have no personal knowledge of the facts on which my suit against the defendant is founded.

2.—That the estate referred to in this suit is situated in the district of Chittagong, and is managed for me by C. D. my gomashta, who in virtue of such appointment is acquainted with the facts in question.

ACT XXIII. OF 1861.

An Act to amend Act VIII. of 1859 *(for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter.)**

Preamble.

WHEREAS it is expedient to amend Act VIII. of 1859, *(for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter,)* and to consolidate the Acts previously passed for the amendment of the said Act: It is enacted as follows.

Acts repealed.

1. Sections 23, 33, 193, 215, 274, 283, 332, 339, 358, 375, and 381 of Act VIII. of 1859, Act IV. of 1860, *(to amend Act VIII of* 1859,) Section 10 of Act XLII. of 1860, *(for the establishment of Courts of Small Causes beyond the local limits of the jurisdiction of the Supreme Courts of Judicature established by Royal Charter,)* and Act XLIII. of 1860, *(to amend Act VIII of* 1859,) are hereby repealed.

*** The rest of the Sections are inserted under those Sections respectively of the Code of Procedure, which they supersede or supplement.

ACT IX. OF 1861.

An Act to amend the Law relating to Minors.†

Preamble.

WHEREAS it is expedient to amend the Law for hearing suits relating to the custody and guardianship of minors: It is enacted as follows.

Application.

1. Any relative or friend of a minor, who may desire to prefer any claim in respect of the custody or guardianship of such minor, may make an application by petition, either in person or by duly constituted agent, to the principal Civil Court of original jurisdiction in the district, by which such application, if preferred in the form of a regular suit, would be cognizable, and shall set forth the grounds of his application in the petition. The Court, if satisfied by an examination of the petitioner or his agent, if he appear by agent, that there is ground for proceeding, shall give notice of the application to the person named in the petition as having the custody, or being in the possession, of the person of such minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient, for the hearing of the petition and the determination of the right to the custody or guardianship of such minor.

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* Received the assent of the Governor General on the 28th August 1861.

† Received the assent of the Governor-General on the 24th April 1861.

2. The Court may direct that the person, having the custody, or being in possession, of the person of such minor, shall produce him or her in Court, or in any other place appointed by the Court, on the day fixed for the hearing of the petition or at any other time, and may make such order for the temporary custody and protection of such minor as may appear proper.

Production, and temporary custody and protection, of minor.

3. On the day appointed for the hearing of the petition, or as soon after as may be practicable, the Court shall hear the statements of the parties or their agents, if they appear by agents, and such evidence as they or their agents may adduce, and thereupon shall proceed to make such order as it shall think fit, in respect to the custody or guardianship of such minor and the costs of the case.

Court, after hearing statements of the parties, &c to make order regarding custody or guardianship of minor.

*** It is observable that the stamps for miscellaneous petitions are required to be used in proceedings and appeals under this law—to prevent the cost of the stamps required in ordinary civil suits from hindering parties from resorting to the courts.

4. In cases instituted under this Act, the Court shall be guided by the procedure prescribed in Act VIII. of 1859, *(for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter,)* in so far as the same shall be applicable and material; and any order made by the Court may be enforced as if such order had been made in a regular suit.

Procedure.

5. An appeal shall lie to the Sudder Court from any order made by a lower Court under this Act, under the rules applicable to regular appeals to such Sudder Court, except that the petition of appeal may be written on a stampt paper of the value prescribed for petitions to the Sudder Court.

Appeal.

6. Any order passed under this Act, in respect to the custody or guardianship of a minor, shall not be liable to be contested in a regular suit.

Orders passed under this Act not liable to be contested in a regular suit.

7. Nothing in this Act shall be taken to interfere with the jurisdiction exercised, under the laws in force, by any Supreme Court of Judicature or the Courts of Wards, or under Act XXI. of 1855, *(for making better provision for the education of male minors and the marriage of male and female minors, subject to the superintendence of the Court of Wards in the Presidency of Fort Saint George,)* and Act XL. of 1858, *(for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal.)*

Saving of laws.

8. The term "Sudder Court" in this Act shall denote the highest Court of appeal in any part of the British territories in India.

Interpretation.

ACT VII. OF 1862,

*Of the Government of Bengal.**

An Act to repeal Section 30 of Regulation II. of 1819, (for modifying the provisions contained in the existing Regulations, regarding the resumption of the revenue of lands held free of assessment under illegal or invalid tenures, and for defining the right of Government to the revenue of lands not included within the limits of estates for which a settlement has been made.)

Preamble.

WHEREAS by Section 30 of Regulation II. of 1819 it is enacted that certain suits, preferred in a Court of Judicature, regarding lands held, or claimed to be held, free of assessment, shall be referred for investigation to the Collector, and that similar suits may be preferred in the first instance to the Collector; and whereas such reference of suits is unnecessary and causes inconvenience and delay in their decision, and it is advisable that such suits should be preferred and disposed of exclusively in the ordinary Courts of Civil Judicature: it is enacted as follows,

*** By Regulation II. of 1819, the suits of Government for the assessment of revenue on lands illegally held rent-free were withdrawn from the jurisdiction of the Civil Courts, to be tried by the Collectors of Revenue. It was supposed that the measure would give great facility to those officers to decide such cases. Hence it was deemed proper that, even in suits between zemindars and lakhirajdars, to assess lands improperly held rent-free or to maintain possession of them exempt from the payment of rent, the Collectors should report on the merits of the disputes between the parties. Such report being indispensable, parties were allowed to institute their suits before the Collectors; and in such case the Judge's decision thereon was considered as a decision on an appeal. But as, by the enactment of Act X. of 1859, almost all suits for rent are instituted and tried before the Collectors, there was a great accumulation of suits under Section 30, Regulation II. 1819. Hence this law to relieve Collectors from reporting upon or otherwise deciding upon such suits.

Section 30 of Regulation II. 1819, repealed.

1. Within the Provinces subject to the Government of Bengal, Section 30 of Regulation II. of 1819 is hereby repealed, except as regards such suits, decided by Collectors under the provisions of that Section, as may be open to appeal at the date of the passing of this Act.

*** The suits decided or reported on by Collectors to the date of the passing of this Act are to be proceeded with as heretofore.

Suits for resumption of land held free of assessment to be tried in the ordinary Civil Courts: so also claims to hold land free of assessment.

2. All suits preferred by proprietors, farmers, or talookdars, to resume the revenue of any land held free of assessment, as well as all suits preferred by individuals claiming to hold land exempt from the payment of revenue, shall be instituted, heard, and determined in and by the Courts of Civil Judicature, like ordinary civil suits,

* Received the assent of the Governor-General on the 1st May 1862.

and under the rules and subject to all the provisions contained in Act VIII. of 1859, *(for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter,)* and not otherwise.

*** "Where a resumption suit is brought under Section 30, Regulation II. 1819, on full stamp, it must be tried under that law and not under Section 28, Act X. of 1859."—*Calcutta Sudder Court's decision, 5th September* 1861.

The report heretofore required from the Collectors is dispensed with; nor are such suits any longer to be instituted before those officers.

Act to apply to all pending suits commenced under Section 30 of Regulation II. 1819.

3. This Act shall apply to all suits commmenced under Section 30 of Regulation II. of 1819, and pending decision under that Section in any Court, (other than a Court to which such suit has come by way of appeal,) or before any Collector, at the time of the passing of this Act. All Collectors shall forthwith transfer to the ordinary Courts of Civil Judicature all such suits, whether originally instituted before them, or referred to them by the Civil Courts, as may be pending before them at the time of the passing of this Act; and all suits so transferred shall be heard and determined as provided for by this Act, and not otherwise.

Collectors shall transfer all suits pending before them to the Civil Courts.

*** This Section is of temporary application. Suits instituted before the Collectors, or referred to them for report, are not to be proceeded with by them, but at once transferred to the Civil Courts as if instituted under this Act.

Act not to invalidate proceedings, &c, under Section 30 of Regulation II. 1819, and transfer of suit to Civil Court not to alter effect of proceedings previously had.

4. This Act shall not in any way invalidate or alter the effect of anything which shall have been done in any suit prior to the passing of this Act; and all proceedings which, prior to the transfer of any suit, shall have been held, or shall have taken place under, or in accordance with, the provisions of Section 30 of Regulation II. of 1819, shall be taken, and shall have effect, so far as circumstances will permit, as if the same had been held or had taken place in due course in the Court to which the suit shall be transferred.

*** All proceedings taken before the Courts, such as the taking of evidence, &c., shall be valid, as if they had been held before the Civil Courts.

ACT XLII. OF 1860.*

An Act for the establishment of Courts of Small Causes beyond the local limits of the jurisdiction of the Supreme Courts of Judicature established by Royal Charter.

Preamble.

WHEREAS, with a view to the more easy recovery of small debts and demands, it is expedient to establish Courts of Small Causes beyond the local limits of the jurisdiction of the Supreme Courts of judicature, established by Royal Charter at the several Presidencies of Calcutta, Madras, and Bombay: It is enacted as follows.

Constitution of Small Cause Courts.

1. It shall be lawful for the Executive Government of any of the said Presidencies or of any place, with the previous sanction of the Governor-General in Council, to constitute Courts of Small Causes, with the required establishment of Officers, at any place within the limits of their respective Governments, for the trial of suits under this Act, and to abolish any Court so constituted. Provided that no Judge of any Court constituted under this Act shall exercise any civil jurisdiction except under the provisions of this Act.

*** The object of the proviso is not clear. It is provided by Section 4, Act XV. of 1843, that "any uncovenanted officer in the Revenue and (or) Judicial Departments" may hold also "the office of deputy magistrate." Under that law a judge of a Mofussil Small Cause Court could be vested with magisterial powers to any extent. This law prohibits his holding any other civil judicial office—a prohibition for which there was no occasion, as his eligibility for such office could not be questioned, so long as he had sufficient leisure. The Government, however, a few months after the passing of this Act, re-considered the point, and have, by Act XII. of 1861, declared him qualified to be not only Principal Sudder Ameen and Magistrate, but in some cases Collector, for the trial of suits under Act X. of 1859. Such changes in principle and practice are a characteristic feature in the British administration of India, but in many respects perplex and harass the people.

Limits of territorial jurisdiction to be fixed.

2. Whenever any such Court may be so constituted, the Executive Government shall fix the territorial jurisdiction of such Court, and may, from time to time, alter the same as may appear proper.

Description of suits cognizable by Small Cause Courts.

3. The following are the suits which shall be cognizable by Courts of Small Causes constituted under this Act, namely, claims for money due, whether on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages,

* Received the assent of the Governor-General on the 6th October 1860. Further rules are provided in Act XII. of 1861, which follows this Act.

when the debt, damage, or demand does not exceed in amount or value the sum of five hundred Rupees. Provided that no action shall lie in any such Court on a balance of partnership account, unless the balance shall have been struck by the parties or their agents; or for a share or part of a share under an intestacy, or for a legacy or part of a legacy under a will; or for any claim for the rent of land or any other claim for which a suit may be brought before a Revenue Officer, or for the recovery of damages on account of alleged personal injuries, unless special damage of a pecuniary nature shall have resulted from such injury.

Proviso.

*** At page 44 of this work will be found what may be to some a more perspicuous description of the suits which, under this Section, are and are not cognisable by the Mofussil Small Cause Courts.

4. Every Court of Small Causes constituted under this Act shall have cognizance of all such suits as are mentioned in the last preceding Section, if the defendant at the time of the commencement of the suit shall dwell, or personally work for gain, within the local limits of the jurisdiction of such Court.

Jurisdiction of the Court.

*** "Dwell." After this word, in the corresponding part of the Charter of the High Court, occur the words, or carry on business,"—a very necessary provision, but repudiated by the Local Legislature.

5. Every Court constituted under this Act shall use a seal, bearing the following inscription in English and in the language of the Court—"Court of Small Causes of ;" and every such Court shall be subject to the general control and orders of the Sudder Court.

Seal of the Court.

Court to be generally subject to the Sudder Court.

6. Wherever a Court of Small Causes is constituted under this Act, no suit cognizable by such Court under the provisions of this Act shall be heard or determined in any other Court, having any jurisdiction within the local limits of the jurisdiction of such Small Cause Court. Provided that nothing in this Act shall be held to take away the jurisdiction which a Magistrate, or a person exercising the powers of a Magistrate, or an Assistant or a Deputy Magistrate, can now exercise in regard to debts or other claims of a civil nature; or the jurisdiction which can be exercised by Village Moonsiffs or Village or District Punchayets under the provisions of the Madras Code, or by Military Courts of Requests, or by Cantonment Joint Magistrates invested with civil jurisdiction under Act III. of 1859, or by a single Officer duly authorised and appointed under the rules in force in the Presidencies of

Suits within the jurisdiction of and cognizable by Small Cause Court, not to be heard by any other Court.

Saving of jurisdiction of Magistrate, &c.—

of Village Moonsiffs and Village or District Punchayets in Madras—

of Military Courts of Request—
of single Officers appointed to try small suits in Madras and Bombay—
and of Military Punchayets in Madras.

Fort St. George and Bombay respectively, for the trial of small suits in Military Bazars, in Cantonments, and Stations occupied by the troops of those Presidencies respectively, or by Punchayets in regard to suits against military persons, according to the rules in force under the Presidency of Fort St. George.

Courts where to be held.

7. Courts of Small Causes constituted under this Act shall be held at such place or places, within the local limits of their respective jurisdictions, as shall from time to time be appointed by the Local Government to which such Courts are subordinate.

Time of holding Courts, if they be directed to be held in more places than one.

8. Whenever any such Court is directed to be held at more places than one within the local limits of its jurisdiction, the Judge of such Court, subject to the control of the Sudder Court, shall appoint the time at which the Court shall hold its sittings in every such place. Due notice of the time so appointed shall be given by a proclamation, to be fixed up in some conspicuous place in the Court-house or other building in which the sittings of the Court are to be held.

Summons.

9. In all suits under this Act the summons to the defendant shall be for the final disposal of the suit; and no written statement other than the plaint shall be received unless required by the Court.

*** As the plaintiff is allowed to file a plaint, it is unfair to the defendant not to allow him to put in a *written statement* of his case to enable the Judge readily to comprehend the nature of his defence. The Judge may mistake the verbal explanations of the defendant, or may prevent him from making his statements in his own way. The Rules of Practice, Section 6, prescribe that "the substance of the evidence" and "the judgment" are to be recorded, but are silent as to any minute of the pleas of the defendant. If the Judge fall into a misconception as to the defendant's meaning, there will be nothing on record to show it. But *litera scripta manet.*

In suits of the nature and amount cognizable by Small Cause Courts, Court may, on verbal application of the judgment creditor, direct immediate execution either against the person or property of judgment-debtor.

10.* When a decree is passed in any suit of the nature and amount cognizable by Courts of Small Causes constituted under Act XLII. of 1860, the Court passing the decree, whether such Court be a Court constituted as aforesaid, or any other Court, may, at the same time that it passes the decree, on the verbal application of the party in whose favor the decree is given, direct immediate execution thereof by the issue of a warrant directed either against the person of the judgment debtor, if he is within the local limits of the jurisdiction

* The original Section X. was repealed by Section 1, Act XXIII. of 1861, and re-enacted by Section 13 of that Act as above. See remarks under Section 212 *a* of this Code.

of the Court passing the decree, or against the personal property of the judgment debtor, within the same limits. If the warrant be directed against the personal property of the judgment debtor, it may be general against any personal property of the judgment debtor, wherever it may be found within the local limits of the jurisdiction of the Court, or special against any personal property belonging to the judgment debtor, within the same limits, which shall be indicated by the judgment creditor.

Execution against immovable property, if movable property not sufficient.

11. In the execution of a decree under this Act, if, after the sale of the movable property of a judgment debtor, any portion of a judgment shall remain due, and the holder of such judgment desire to issue execution upon any immovable property belonging to the judgment debtor, the Court, on the application of such judgment creditor, shall grant him a copy of the judgment and a certificate of any sum remaining due under it; and on the presentation of such copy and certificate to any Civil Court having general jurisdiction in the place in which the immovable property of the judgment debtor is situate, such Court shall proceed to enforce such judgment according to its own rules and mode of procedure in like cases.

Decision in certain suits to be final. Proviso.

12. In suits tried under this Act, all decisions and orders of the Court shall be final. Provided that it shall be competent to the Court, if it shall think fit, to grant a new trial if applied for within the period of thirty days from the date of the decision; but no new trial shall be granted unless the party applying for the same shall, with his application, deposit in Court the amount for which judgment shall have been given against him, including the costs (if any) of the opposite party.

*** "Final." The principal object of the Code of Civil Procedure was uniformity, for the attainment of which the Legislative turned a deaf ear to the vehement protest of the Bombay Sudder Court of the superiority of the Code of that Presidency in point of simplicity. Yet within a short time the country presents the singular spectacle of a number of courts, in which suits of a value not less than 300 Rupees are decided without appeal, and of other Courts in the vicinity, all of whose decisions for the smallest amount are appealable, and, though not open to a second or special appeal, may be argued, if the Appellate Courts so decide, before the highest Court in the Country.

The grounds on which a new trial can be applied for, are not here hinted. The Rules of Practice, Section 9, state that, "on the application being made, the procedure prescribed by Section 378 of Act VIII of 1859, for *disposing* of applications for reviews, shall be followed." Section 375, relating to grounds for review, mentions "the discovery of new matter or evidence," and more widely "any other good and sufficient reason." Section 378 includes "any evident error or omission" and "the ends of justice." Precision should have been aimed at in these

instances, especially as the suits in the Courts of Small Causes are supposed to be not of a complicated nature.

Court may refer questions of law, &c. to Sudder Court.

13.* If, in the trial of any suit under this Act, any question of law, or usage having the force of law, or the construction of a document affecting the merits of the decision, shall arise, on which the Court shall entertain reasonable doubts, the Court may, either of its own motion or on the application of any of the parties to the suit, draw up a statement of the case and submit it, with its own opinion, for the decision of the Sudder Court.

Court may pass decree contingent upon the opinion of the Sudder Court, pending which execution not to issue.

14. The Court may proceed in the case notwithstanding a reference to the Sudder Court, and may pass a decree contingent upon the opinion of the Sudder Court on the point referred; but no execution shall be issued in any case in which a reference shall be made to the Sudder Court, until the receipt of the order of that Court.

Full bench of the Sudder Court to decide cases referred under this Act.

15. Cases referred for the opinion of the Sudder Court shall be dealt with by a full bench of that Court.

Sudder Court to fix an early day for the hearing of the case.
Proclamation thereof.

16. The Sudder Court shall fix an early day for the hearing of the case, and shall notify the same by a proclamation to be fixed up in the Court-house of that Court.

Parties may appear and be heard in person or by pleader.

17. The parties to the case may appear and be heard in the Sudder Court in person or by pleader.

Decision of Sudder Court how to be transmitted.

18. The Sudder Court, when it has heard and considered the case, shall transmit a copy of its judgment, under the seal of the Court and the signature of the register, to the Court by which the reference was made; and such Court shall, on the receipt thereof, proceed to dispose of the case conformably to the decision of the Sudder Court.

Costs of reference to Sudder Court.

19. Costs, if any, consequent on the reference of a case for the opinion of the Sudder Court, shall be costs in the suit.

Sudder Court empowered to make rules of practice, &c.

20.† The Sudder Court shall have power to make and issue general rules, for regulating the practice and proceedings of the Courts established under this Act, and also to prescribe forms for every proceeding in the said Courts for which it shall think necessary that a form be provided, and for keeping all books, entries, and

* This and the six following Sections appear as Section 372 *b—h* of the Code, *which see*.

† This Section may be regarded as superseded by Section 40, Act XXIII. of 1861, which provides for the preparation and submission of statements required by the superior Court, and the publication of rules of practice in the Official Gazette. The Section appears as the amended Section 381 of the Code.

accounts to be kept by the officers, and from time to time to alter any such rule or form. Provided that such rules and forms be not inconsistent with the provisions of this Act or of any other law in force.

Provision of Act VIII. of 1859 made applicable to cases cognizable under this Act.

21. Except as hereinbefore provided, the provisions of Act VIII of 1859, *(for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter,)* shall be applicable to cases cognizable under this Act in so far as the same may be applicable and necessary.

ACT XII OF 1861.

An Act to amend Act XLII. of 1860.*

Preamble.

WHEREAS it is expedient to amend Act XLII. of 1860, *(for the establishment of Courts of Small Causes beyond the jurisdiction of the Supreme Courts of Judicature established by Royal Charter)*: It is enacted as follows.

Judges of Small Cause Courts may be invested with powers of a Principal Sudder Ameen.

1. The Local Government may invest any Judge of a Court of Small Causes, constituted under Act XLII. of 1860, with the powers of a Principal Sudder Ameen, within such local limits as the local Government shall from time to time appoint.

*** It is the object of this Section and the two Sections that follow to maximise the services of Judges of Small Cause Courts, on the economical principles which have been in vogue in this country, by which Collectors were burdened with the duties of Magistrate, and, more recently, Moonsiffs with those of Deputy Magistrate, under Section 4, Act XV. of 1843. The leisure which those Judges are supposed to enjoy, rather than any special or general aptitude, is the moving cause of this union of offices.

"The powers of a Principal Sudder Ameen" are mentioned to imply that the judicial duties, which may devolve on any officer, are to be limited to the trial of original suits and appeals referred to him, and performed in subordination to the Judge of the district, but are not to include superintendence and control over other judicial officers.

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* Received the assent of the Governor-General on the 20th May 1861.

From the varying phraseology employed in the first three Sections, it would seem that Sections 1 and 2 are to be read together, and imply that the Judges of Small Cause Courts may be employed in the performance of the duties of Principal Sudder Ameen and Magistrate, in addition to their own, but are not to be empowered at the same time to try suits under Act X. 1859. On the other hand a Judge so *empowered* is not to perform any duties as Principal Sudder Ameen or Magistrate.

Also with powers of a Magistrate, to decide suits, but not other criminal matters.

2. The Local Government may also invest the Judge of any Court of a Small Cause, constituted as aforesaid, with all or any of the powers of a Magistrate, within such local limits as the local Government shall from time to time appoint, for the trial and decision of cases cognizable by a Magistrate; but no other jurisdiction in criminal matters shall be exercised by any Court so constituted.

*** "No other jurisdiction" probably refers to their being exempt from all other duties performed by Magistrates, such as police and jail duties, and to their exercising no control over the police officers.

"Any Court so constituted." The phrase is scarcely applicable to an officer vested with certain limited powers.

Judges of such Courts may be invested with powers of a Collector to try suits under Act X of 1859, but not appeals.

3. In the places in which the provisions of Act X of 1859 *(to amend the law relating to the recovery of rent in the Presidency of Fort William in Bengal)* are in force, the local Government may empower any Judge of a Court of Small Causes, constituted as aforesaid, to hear and determine, under the rules contained in the said Act X. of 1859, applicable to trials before a Collector and subject to the same regular and special appeal, the claims cognizable under that Act arising within the local limits of the jurisdiction of such Court. Any Judge so empowered shall exercise all the powers of a Collector under the said Act X. of 1859, except the power of hearing appeals.

*** The cases referred to in Act X. of 1859, were made exclusively triable by Revenue Officers on account of their supposed competency to deal with matters relating to lands. This rule implies the same fitness in all Officers.

"All the powers of a Collector," &c. This clause seems to militate with the object of the preceding, which gives the officer the power simply of trying the suits specified in Section 23, Act X. 1859. For instance, by this clause the Judge of a Small Cause Court, empowered to act as Collector, may be called upon, under Section 25 of that Act, for "assistance to eject a cultivator," but will be unable to afford it from not having, like the Collector, an establishment suitable for the purpose.

Appointment and removal of Clerk of the Court.

4. An officer, to be styled the Clerk of the Court, may be appointed to any Court of Small Causes constituted as aforesaid, on such salary as shall be authorised by the Governor General of India in Council. The appointment and removal of such officer shall rest with the Court, subject to the approval of the Local Government.

Duties of the Clerk.

5. When a clerk is appointed to any Court of Small Causes constituted as aforesaid, such clerk shall, subject to the orders of the Court, issue all summonses, warrants, orders, and writs of execution, and keep an account of all proceedings of the Court, and shall take charge of and keep an account of all monies payable or paid into or out of Court, and shall enter an account of all such monies in a book belonging to the Court to be kept by such clerk for that purpose.

*** The clerk is to unite in his person the offices of accountant and treasurer, as the Judge may those of a Principal Sudder Ameen and Magistrate, if the view taken of Sections 1 and 2 be correct.

"Take charge of." The words "monies paid into Court" should here be inserted, to avoid the incongruity of the Clerk's being supposed (from the wording of the clause as it stands) to "take charge of monies paid out of Court."

Which of several Courts in a district to be the principal Court of the district.

6. Whenever more Courts than one are constituted in any district under the said Act XLII. of 1860, the Local Government may appoint one of the said Courts to be the principal Court of Small Causes in such district.

*** The ground of the distinction is not stated, *i. e.* whether it is to be superior legal knowledge or seniority in the service.

Judge of principal Court may sit with Judge of any other Court in the district, for the trial of certain suits.

7. The Judge of the principal Court of Small Causes in any district may sit with the Judge of any other Court of Small Causes, constituted as aforesaid, in the same district, for the trial and determination of any suit cognizable under the said Act XLII. of 1860, which the Judge of such other Court may reserve for trial by himself and the Judge of the principal Court of Small Causes.

Procedure when two Judges sit together for the trial of certain suits.

8. When two Judges sit together for the trial of a suit under the last preceding Section, and they concur in the decision or order to be passed, such decision or order shall be the decision or order of the Court, and shall be signed by both Judges. If in the trial of any suit such Judges shall differ on a point of law, or usage having the force of law, or on the construction of a document affecting the merits of the decision, they shall submit a case, for the opinion of the Sudder Court, on the point of difference between them, in the manner

prescribed in Section 13, of the said Act XLII. of 1860; and the rules applicable to a reference to the Sudder Court contained in Sections 14, 15, 16, 17, 18, and 19 of the said Act, shall be applicable to the reference made in such suit.

*** See the remarks under Section 13, Act XLII. of 1860. Under that Section, the Judge seeking the opinion of the High Court is required to give his own. The same thing is here implied.

If Judges differ, the Judge of the principal Court to have the casting voice.

9. If such Judges differ on any matter other than the matters abovementioned, the Judge of the Principal Court of Small Causes shall have the casting voice.

*** "Any other matter"—the merits of the case or questions of fact. The casting vote being given to the higher officer, the lower will not be disposed to make such references. The rule casts a slur on the ordinary class of Judges of the Small Cause Courts, that cannot fail to lower the institution in the public opinion. Their judgments, whether involving a matter of fact or law, are final in ordinary cases, and yet without any weight if turning on matters of fact and accidentally opposed to that of an officer of the same class, who may owe his superior rank to his being of the legal profession, not to greater local or general experience.

Trial of pending suits.

10. All suits cognisable under the provisions of the said Act XLII. of 1860, which shall be pending before any Court within the limits of the jurisdiction of a Court of Small Causes constituted under the said Act, at the time of the constitution of such Court, shall be heard and determined in the same manner as if such Court had not been constituted.

RULES OF PRACTICE FOR COURTS OF SMALL CAUSES.

By virtue of the powers vested in the Sudder Court, under Section 20 of Act XLII. of 1860, the following are laid down as the Rules of Practice for Courts of Small Causes.

1. On presentation of a plaint and verification, in accordance with Sections 25, 26, 27, and 28 of Act VIII. of 1859, the Court shall issue, under the seal of the Court, a summons in the form prescribed in the Schedule *B* of Act VIII. of 1859, which shall be numbered and dated of the day when issued, and shall set forth the names of the plaintiff and defendant, the cause of action, and the amount sued for.

2. The summons shall be served on the defendant seven clear days before the day on which the Court shall be holden at which the cause is to be tried, unless the Court shall otherwise order; but a summons may be made returnable at a longer or a shorter date, in the discretion of the Court, with reference to distance or to any other cause.

3. A receipt or plaint-note, shall, on the filing of the plaint, be given to the plaintiff, containing the number of the summons and of the

suit in the Register book ; and no execution shall be issued nor any money paid out of Court, except on production of the said receipt or by order of the Judge.

4. The cause of action shall be transcribed from the plaint into the Summons book ; and the substance of the cause of action shall be entered in the Register book. Both books shall be in the form hereunto annexed, and marked *A* and *B*.

5. No misnomer or inaccurate description of any person or place in any such summons shall vitiate the same, if the person or place be therein described so as to be commonly known.

6. The substance of the evidence, the judgment, and the decree, shall be entered in the Summons book, as in form *A* given in the Schedule hereto annexed.

7. When any order is made for the payment of any debt or damages, costs, or other sums of money by instalment, the same shall be payable at the office of the Clerk, at such periods as the Court shall order ; and if no order be made fixing the dates of payment of the instalments, then the first instalment shall become due at the expiration of one calendar month from the day of making the order, and every successive instalment at a like period of one calendar month from the day of the previous instalment becoming due ; and after default in payment of any instalment, execution may be sued out for the whole amount then remaining unpaid, unless the Court shall otherwise order ; provided that such execution shall not issue upon such default, if the instalment or instalments then due shall be paid into Court at any time before execution is applied for.

8. When a new trial is granted in accordance with Section 12, Act XLII. of 1860, all former proceedings become null and void, and the plaintiff shall be at liberty to file his plaint *de novo*, and thereupon the Court shall cause a summons to be issued in the usual manner.

9. On an application for a new trial being made, the mode of procedure prescribed by Section 378 of Act VIII. of 1859, for disposing of applications for reviews of judgment, shall be followed.

10. In cases in which the defendant has moved the Court for a new trial, and has deposited the sum decreed against him, as required by Section 12, Act XLII. of 1860, the Court shall detain the money till the new trial be granted, or till such other time as the Court shall order. In the event of notice not being given to the Court as aforesaid, or of the rule being refused, the plaintiff may take the money out of the Court without further delay.

11. If the Court be of opinion that a new trial should be granted, the plaintiff shall proceed to set his cause down for rehearing within six days, unless some other time be granted by the Court, and in default the defendant shall be at liberty to withdraw his deposit. Should the new trial be granted, the order shall be made on such terms, as to the payment of costs, as the Court shall direct. If on the hearing of the

second trial, the verdict is entered for the plaintiff, the judgment may be satisfied *pro tanto* out of the sum already deposited for debt and costs by defendant, with right of execution against the goods or person of the defendant, for the amount payable by the defendant over and above the sum deposited.

12. If, on the hearing of the second trial, the verdict is entered for the defendant, he shall be at liberty to withdraw his deposit.

13. No warrant of execution or commitment shall be executed after the expiration of two calendar months from the date thereof; provided that second and successive warrants of execution may be issued, by order of the Judge, at the expiration of two calendar months from the date of each, on payment of the prescribed costs of execution by the party issuing out the same.

14. Every officer required to execute any warrant of execution, if he shall not have executed such warrant, shall return the same to the officer of the Court at the expiration of one month, from the date of the issue thereof; and every officer, levying or receiving money by virtue of any process out of the Court, shall forthwith, or as soon after the receipt thereof as practicable, pay over the same to the Court.

15. No person can be permitted to practise as a pleader in the Courts of Small Causes in the Lower Provinces unless he holds a diploma, or has passed the examination test for the higher or lower grade of pleaders in the Civil Courts.

16. With reference to Section 20, Act XLII. of 1860, the forms in the Schedule hereunto annexed, are prescribed for use in the Courts of Small Causes.

ACT X. OF 1859.

An Act to amend the Law relating to the recovery of Rents in the Presidency of Fort William in Bengal.

WHEREAS it is expedient to re-enact, with certain modifications, the provisions of the existing law, relative to the rights of ryots of land, to the prevention of illegal exaction and extortion in connection with demands of rent, and to other questions connected with the same, to extend the jurisdiction of Collectors, and to prescribe rules for the trial of such questions, as well as of suits for the recovery of arrears of rent, and of suits arising out of the distraint of property for such arrears, and to amend the laws relating to distraint: it is enacted as follows.

*** All suits of the descriptions mentioned in Section 23 are "cognisable by the Collectors of Land Revenue," and are to be "instituted and tried under the provisions of this Act, and, except in the way of appeal, as provided therein," are "not cognisable in any other Court or by any other officer, or in any other manner," excepting by Judges of the Mofussil Small Cause Courts, empowered, under Section 3, Act XII. of 1861, to exercise the powers of a Collector in the trial of such suits. The Sections of the Act, which require the particular attention of

Judicial Officers, as indicating the limits and boundaries of the authority of the ordinary Civil and the Revenue Courts, respectively, are the undermentioned. The Constructions on the point, which could not be appropriately included in the Comments on the Code of Civil Procedure, are here inserted.

Section 1. [Laws repealed and modified.]
Section 2. [Ryot entitled to a pottah.]
Section 3. [Ryots holding land at fixed rates, to receive pottahs—]
Section 4. [Provided rent of land have not been changed for 20 years.]

The defendants claimed exemption under Section 4, Act X. of 1859, from enhancement of rent, on the ground of the presumption arising from having paid the same rent for twenty years. But the pottah they had obtained from Government, when the zemindaree was under its khas management, shewed that their tenure dated back not more than thirty years previously to the commencement of the suit, and relieved the plaintiff from proving a point already *sufficiently established*.—The designation of talookdar applied to the defendants in the Government pottah, and adopted by the plaintiff in another suit, is no bar to his right to enhanced rent.—*Calcutta Sudder Court*, 27*th March* 1862.

See also Calcutta Sudder Court's decision of the 5th December 1861.

Section 5. [Ryots having right of occupancy, but not holding at fixed rates, to receive pottahs.]

The rates assessed on certain lands, in a suit decided *ex parte* and without local inquiry, are no good criteria for determining those assessable on other lands in the same village.—*Calcutta Sudder Court*, 27*th March* 1862.

Section 6. [Right of occupancy of ryot cultivating or holding land for 12 years.]

Held that Section 6, Act X. 1859, has no retrospective effect.—*Calcutta Sudder Court*, 31*st December* 1861.

A ryot, having been admitted by the Zemindar to have held the lands for more than 12 years, is entitled to a pottah at fair and equitable rates, as prescribed by Section 5.—*Calcutta Sudder Court's decision, Ramanund Mundul* versus *Ramsunker Bannerjee*, 27*th March* 1862.

Sections 7—9. [Contracts and pottahs and kuboolyuts.]

Sections 10—17. [Exactions—compulsory attendance of ryot—enhancement of rent.]

Section 18. [When ryot may claim abatement of rent.]

A landholder cannot sue an undertenant for the rent of land admitted to have been taken by the Government for its own purposes.—*Calcutta Sudder Court*, 26*th March* 1862.

Sections 19—20. [Relinquishment of land. Definition of arrears.]

Sections 21—22. [Consequences of unpaid arrears.] See the Construction of the 31st December 1860, under Section 78.

Section 23. [Exclusive jurisdiction of Collectors over suits—]

Clause 1. [Regarding pottahs and kuboolyuts, and rates of rent thereunder.]

A zemindar, having established his right to resume some lakhiraj land, can, after issue of notice to the tenant, of the rates of rent demanded for the land, institute a suit, under Section 31, Act X. of 1859, to obtain the confirmation of those rates, and procure a kuboolyut, in accordance therewith; but no arrears of rent can be decreed to him in such suit.—*Calcutta Sudder Court, 13th July* 1861.

It is competent to a zemindar, after issue of notice to a ryot, of enhancement of rent, under Section 13, Act X. of 1859, to institute a suit to determine the rates of enhanced rent and enforce the delivery of a kuboolyut under Sections 23 and 31, at the rates determined.—*Calcutta Sudder Court, 31st March* 1862.

Clause 2. [For exaction or illegal rent, refusal of receipts, and *duress.*]

Suits, for exaction of rent of putnees, cannot be brought under Section 23, Act X. of 1859, but only under Clause 2, Section 14, Regulation VIII. of 1819.

Clause 3. [Relating to exorbitancy and abatement of rent.]

Clause 4. For arrears of rent of land, or of pasturage and other rights in land.]

The Revenue Courts are not competent to investigate pleas of set-off, when the accounts, which include the items on which set-off is claimed, have not been previously admitted by plaintiff, or when the matter of the set-off involves inquiries beyond the restricted jurisdiction of those Courts.—*Calcutta Sudder Court, 5th October* 1861.

A suit for the rent of a given year having been dismissed, and no appeal preferred from the order of dismissal, another suit for the same, questioning the propriety of the dismissal, cannot be instituted. The receipts filed, in proof of payment of rent, having been accepted by the Appellate Court as genuine, and the accounts filed to disprove them rejected as not reliable, it was held, in special appeal, that the claim for rent was properly dismissed.—*Calcutta Sudder Court, 27th March* 1862.

A obtained a decree for, and, according to his allegation, got possession of an estate. In that decree the farm of the estate held by *B*, from another party, was declared to be invalid. *B*, alleging that he was still in possession, and that the decree was the subject of cross-appeals, sued his sub-lessee of a portion, for rent. That suit was dismissed. Held, in special appeal, that it should have been ascertained if the lessee was still in possession, as, in that case, he was entitled to collect the rents, under a liability to account to the decree-holder.—*Calcutta Sudder Court, 27th March* 1862.

An under-tenant acknowledged being in possession of his tenure, with the exception of an intermediate period, and was declared by the Appellate Court not liable for the rents of such period. Held, in special appeal, that, as he did not plead ouster by some act of the zemindar, and is registered in the Zemindar's office as the proprietor of the tenure, there is no reason why he should not be held liable for the rents, at the rate found to be the correct one.—*Calcutta Sudder Court, 27th March* 1862.

Two sets of defendants were declared liable for rents claimed, the one set being held to be in possession of a putnee for the other, the *benamee* proprietors, but exempted from the payment of interest, on the ground of delay in bringing the suit. The alleged *benamee* proprietors appealed, to be declared exempt from liability, and the plaintiff appealed against so much of the decree as refused him interest. The Appellate Court released the former from liability, and, through misapprehension, dimissed the appeal of the latter. Held, in special appeal, that that order does not imply the dismissal of the whole suit. The defendants, in possession of the putnee, by not appealing, must be considered as having acquiesced in the judgment pronounced against them; and they are liable for interest, the suit being founded on a kuboolyut which provides for the payment of it The Judge's order, refusing to grant interest, reversed, and the case decreed, with costs.—*Calcutta Sudder Court, 27th March* 1862.

Clause 5. [To eject a ryot or cancel a lease, on the ground of arrears.]

Clause 6. [To recover possession of land, farm, or tenure, on illegal ouster by landholder.]

Clause 7. [Relating to distraint.]

Section 24. [Against zemindars' agents.]

Sections 25—27. Applications for assistance to eject ryot or farmer, or carry out attachment or ejectment, to effect survey and measurement of lands, and enforce registry of transfers of under-tenures.]

An appeal from the orders of a Collector, passed under Sections 25, 26, and 27, Act X. of 1859, lies to the Commissioner, and not to the Civil Court.—*Calcutta Sudder Court, 17th June* 1861.

A suit, brought against the vendor of a transferable tenure for old arrears, may be defended by a vendee, unquestionably in possession, notwithstanding non-registration of the sale.—*Calcutta Sudder Court, 3rd September* 1861.

Section 28. [Applications to dispossess alleged grantees of rent-free lands.]

Orders passed by the Collector under Section 28, Act X. of 1859, not being of a judicial character, are appealable to the Commissioner, and not to the Judge.—*Calcutta Sudder Court, 22nd August* 1861.

Where a resumption suit is brought under Section 30, Regulation II. 1819, on full stamp, it must be tried under that law and not under Section 28, Act X. of 1859.—*Calcutta Sudder Court, 5th September* 1861.

Section 29. [Suits by or against Surburakars and Tuhseeldars.]

Sections 30—33. [Limitation of certain suits.]

Sections 34—35. [Institution and conduct of suits.]

Section 72. [Postponement for further evidence.]

"Any subsequent day." In a suit, involving a title to land where the agent has not received the necessary papers from his client, (in this instance a neighbouring tributary prince, a postponement should be granted for the interests of justice.—*Calcutta Sudder Court's decision, Maharajah Nurrundur Narain Bhoop and others* versus *Trilochun Chatterjee and others, 31st July* 1861.

Sections 73—76. [Local inquiry—Payment into Court, &c.]

Section 77.—[Claim by a third party to the rents sued for, and right to establish title by suit in the Civil Court within a year from the date of adverse decision.]

A ryot, on being sued for rent, pleaded that he had sold a part of his lands, and paid a portion of the rent to the farmer of the estate. The suit being decreed, the farmer and vendee appealed to the Judge, with the ryot, but were not heard. Held by the Sudder Court that the Judge should have remanded the case to the Collector, under Section 77, Act X. of 1859, to be tried *de novo.—Calcutta Sudder Court, 5th September* 1861.

In a suit for rent for an amount under 100 Rupees, in which an intervener, who claims a right to receive the rents, is made a party under Section 77 of Act X. of 1859, no question of right or title is involved, such as to justify an appeal to the Judge from a Deputy Collector's decision. A decision passed by the Judge under such circumstances is reversed, and the Collector authorised to hear an appeal from his Deputy's decision, if preferred within one month from date of special appeal judgment.—*Calcutta Sudder Court, 1st October* 1861.

In a suit for rents of certain lands, to which *A* was not a party the decree of a Revenue Court set aside a kuboolyut given to him by *B*, and declared *C* to be entitled to the same. Held that *A* is prevented by that decree from obtaining the rents, until he establish a superior title to *C's.—Calcutta Sudder Court, 17th March* 1862.

Section 78.—[Suits for ejectment of ryot or cancelment of a lease.]

A decree for arrears of a particular year is *primâ facie* proof of payment of rents of previous years.—*Calcutta Sudder Court, 5th September* 1861.

Held that Sections 21, 22, and 78, Act X. of 1859, must be read together; that those parties only can be ejected under Section 78, who come within the purview of Sections 21 and 22; that persons with a permanent or transferable interest do not come under those Sections, and consequently to them Section 78 does not apply; that a decree-holder must realise his dues from them by the mode enjoined in Section 105 of the Act, *viz.* by the sale of the tenure, and, if that does not suffice, by the sale of any other property, movable or immovable, belonging to the debtor.—*Calcutta Sudder Court, 31st December* 1860.

A plea of an under-tenure being of a transferable nature, neither refuted by proof nor even denied, precludes the Collector from declaring the holder of it liable to eviction, in case of non-payment, within fifteen days, if decreed.—*Calcutta Sudder Court, 26th March* 1862.

Sections 79—99. [Judgment, execution, &c.]

Sections 100—102. [Claims to property taken in execution.]

Section 103—[Collector's orders thereon not appealable, but *may be contested by a suit in the Civil Court* within one year from date thereof, for damages.]

Section 104. [Sale not vitiated by irregularity, but party endamaged *may recover damages by action in the Civil Court,* brought within a year from the date of the sale.]

Sections 105—107. [Sale of transferable tenures. Claims of third parties thereto to be disposed of by Collector, *subject to a suit in the Civil Court* brought within a year from the date of his judgment.]

Sections 108—111. [Execution of decrees.]

Sections 110.—138. [Rules of Distraint.]

Sections 139—140. [Claimant of property distrained, to institute a suit before the Collector against the distrainer and other person,—rights of distrainer have *priority* over sales and mortgages, and *attachments, in execution of judgment,* of any *Civil Courts.*]

Sections 141—149. [Suits before Collectors for damages for illegal distraint—Resistance of distraint—Costs—Local Jurisdiction—Agents.]

Sections 150—152. [Powers of Deputy Collectors, subject to control of Collectors, Commissioners, and Boards—Appeals.]

Section 153. [Collector's judgments for a sum less than 100 Rupees in what cases final.]

Suits, in which the amount in dispute does not exceed 100 Rupees, and which do not involve any question of title, are, when tried by an Assistant or Deputy Collector, appealable to the Collector and not to the Judge.—*Calcutta Sudder Court, 22nd August* 1861.

In this case the Assistant Collector had found that the alleged distraint had not taken place; but the Judge held that it had, and that

the plaintiff's object in making it was to set up indirectly a title to the land. But see Construction of the 7th November 1861, and also of the 1st October 1861.

Section 154. [Collector may review his own judgments.]

Sections 155—159. [Appeals from Deputy Collectors, in certain cases, to the Collector—Mode of hearing, &c.]

Sections 160, 161. [Appeals, in certain cases, from judgments of Collectors and Deputy Collectors, to the Zillah Judge, and, in suits for more than 5,000 Rupees, to the Sudder Court.]

No appeal having been preferred, by the plaintiff, from that part of the Collector's decision, which declared a portion of the land not to be in the defendants' possession. the Judge's decision, which inadvertently decreed enhanced rent for the whole of the land in question, was modified in special appeal.—*Calcutta Sudder Court, 27th March* 1862.

The misconstruction of a written document, forming the basis of a plaintiff's claim or a defendant's plea in a suit under Act X. of 1859, is a substantial error in law in the investigation of the case, which may produce errors in the decision thereof on its merits, and is consequently a ground of special appeal under Section 372, Act VIII. of 1859.—*Calcutta Sudder Court, 1st October* 1861.

Held that judgments, passed in appeal by the Zillah Judges under Act X. of 1859, are open to special appeal.—*Calcutta Sudder Court, 30th March* 1861.

ACT X. OF 1861.*

An Act to repeal certain Regulations and Acts relating to the Procedure of the Courts of Civil Judicature not established by Royal Charter.

Preamble.

WHEREAS by Act VIII. of 1859 a Code of Procedure is provided for the Courts of Civil Judicature not established by Royal Charter; and whereas it is enacted, by Section 387 of the said Act, that the Act shall come into operation in the Presidency of Bengal from the 1st day of July 1859, and in the Presidencies of Madras and Bombay from the 1st day of January 1860, or from such earlier day as the Local Government in those Presidencies respectively shall fix and shall publicly notify in the Gazette of the Presidency, three months at least before the date so fixed, and it is also enacted, by Section 385 of the said Act, that the Act shall not take effect in any part of the territories not subject to the general Regulations of Bengal, Madras, and Bombay, until the same shall be extended thereto by the Governor-General of India in Council or by the Local Government to which such territory is subor-

* Received the assent of the Governor-General on the 29th April 1861.

dinate and notified in the Gazette; and whereas it is expedient to repeal, in the manner hereinafter provided, certain Regulations and Acts and parts of Regulations and Acts relating to the Procedure of the said Courts; it is enacted as follows.

Repeal of Laws.

1. In the Presidencies of Bengal, Madras, and Bombay, and in any other part of the British territories in India to which Act VIII. of 1859, (*for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter,*) has been or shall be extended before the 1st May 1861, the several Regulations and Acts and parts of Regulations and Acts set forth in the Schedule hereto annexed, except in so far as they repeal the whole or any part of any other Regulation or Act, shall, to the extent expressed in the said Schedule, be repealed from the said 1st May 1861, and so far as they relate to any part of the said territories to which the said Act VIII. of 1859 has not been extended, then from the time when the said Act shall be extended to such part by a Notification in the Gazette by the Governor-General of India in Council, or by the Local Government to which such territory is subordinate.

SCHEDULE OF REGULATIONS AND ACTS REPEALED.*

Act V of 1836—The whole Act.

Act XI of 1836—In so far as the Act is applicable to any suit or other proceeding under Act VIII of 1859.

Act XXIV of 1836—Section V in so far as the Section is applicable to any suit or other proceeding under Act VIII of 1859.

Act III of 1837—The whole Act.

Act XXV of 1837—Sections III and IX.

Act XXXV of 1837—The whole Act.

Act VII of 1838—The whole Act.

Act XVII of 1838—The whole Act.

Act XXII of 1838—The whole Act.

Act XXVII of 1838—The whole Act.

Act III of 1839—In so far as the Act is applicable to a suit or proceeding under Act VIII of 1859.

Act IX of 1839—The whole Act.

Act XIX of 1840—The whole Act.

Act VII of 1841—The whole Act.

Act XVII of 1841—Section II so far as it relates to the Sudder Dewanny Adawlut.

Act XXIX of 1841—The whole Act.

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* This Schedule appears in the Act in a tabular form, Col. 1, comprising "Reference to Regulation or Act," Col. 2, "Title of Regulation or Act," and Col. 3, "Extent of Repeal." It will be perceived that the *titles* have been here omitted, to avoid swelling the work.

Act II of 1843—The whole Act in so far as the Act is applicable to suits or proceedings under Act VIII of 1859.

Act VI of 1843—The whole Act.

Act VII of 1842—Sections X, XI, XIV, Clause 1st of Section XVII, Sections XVIII, XIX, and XXV.

Act XII of 1843—The whole Act.

Act IX of 1844—The whole Act except Section III.

Act III of 1845—The whole Act.

Act VIII of 1845—The whole Act.

Act XV of 1845—Sections I, II, III, IV, and V.

Act XVI of 1845—The whole Act.

Act XII of 1845—The whole Act.

Act IV of 1846—The whole Act.

Act XVII of 1847—The whole Act.

Act III of 1850—The whole Act.

Act XIII of 1850—The whole Act.

Act XV of 1850—The whole Act.

Act XXV of 1850—The whole Act so far as it relates to forfeited deposits of sales of land or any interest in land in execution of decrees.

Act VII of 1851—The whole Act.

Act XXV of 1852—The whole Act, except so far as it relates to the execution of decrees made in appeal by Her Majesty in Council.

Act XXVI of 1852—The whole Act.

Act XXXIII of 1852—The whole Act, except so far as it relates to the enforcement of judgments by any Court established by Royal Charter, and also except so far as it relates to the enforcement of decrees of Military Courts of Requests.

Act XV of 1853—The whole Act.

Act XVI of 1853—The whole Act,

Act XIX of 1853—The whole Act so far as it is applicable to any suit or other proceeding instituted under Act VIII of 1859, except Sections XIX and XXVI of Act XIX of 1853.

Act IX of 1854—In so far as the Act is applicable to any suit or proceeding under Act VIII of 1859.

Act XXXIII of 1854—So much of the Act as is applicable to any suit or other proceeding instituted under Act VIII of 1859.

Act II of 1855—Sections XXV and XXVI in so far as the Sections are applicable to any suit or proceeding under Act VIII of 1859.

Act IX of 1855—The whole Act.

Act X of 1855—The whole Act, except Sections IX and X.

Act XXXIV of 1855—The whole Act, except so far as it relates to the enforcement of judgment by any Court established by Royal Charter.

Act XII of 1856—Sections VI and VII.

Bengal.

Regulation III. 1793—Sections VII, VIII, IX, X, XI, XII, XIII, XV, XVI, XVIII, XIX, and XX.

Regulation IV. 1793—Sections I, II, III, IV, V, VI except so much as relates to the administering oaths to parties and witnesses; VII, VIII, X, XI, XII, XIII, XVI, XVIII, XIX, XXI. and XXVI.

Regulation V. 1793—The whole Regulation.

Regulation VI. 1793—Sections IV, V, VI, VII, IX, X, XI, XII, XV, XVI, and XVII except so much as relates to the administering oaths; XVIII, XIX, XX, XXI, XXII, XXVIII, XXIX, and XXX.

Regulation XVI. 1793—The whole Regulation.

Regulation VII. 1795—Sections VII, IX, X, and XI except so far as it extends Section XXI Regulation III. 1793, and Section XII.

Regulation VIII. 1795—Section II in so far as it extends the provisions of Regulation IV. 1793 which are repealed by this Act.

Regulation IX. 1795—The whole Regulation.

Regulation X. 1795—Section II in so far as it extends the provisions of Regulation VI. 1793 which are repealed by this Act, and Section III.

Regulation XV. 1795—Section II.

Regulation XXXVI. 1795—The whole Regulation except Section VI.

Regulation LIV. 1795—The whole Regulation.

Regulation XIII. 1796—The whole Regulation.

Regulation XII. 1797—The whole Regulation.

Regulation XIX. 1797—The whole Regulation.

Regulation II. 1798—Sections V, VI, VII, VIII, IX, and X.

(By Act L of 1860) Regulation III 1798 Section II or III.

Regulation V. 1798—The whole Regulation.

Regulation III. 1800—The whole Regulation.

Regulation II. 1801—Section VI in so far as it relates to suits or proceedings under Act VIII of 1859.

Regulation III. 1802—The whole Regulation.

Regulation II. 1803—Sections IV, V, VI, VII, IX, X, XV, XVI, and XX.

Regulation III. 1803—Sections II, III, IV, V, VI, and VII, except so much of it as relates to the administering of oaths to parties and witnesses, IX, X, XII, XIII, XIV, XV, XVII, XVIII XIX, XX, XXVII, XXVIII, and XXIX.

Regulation IV. 1803—The whole Regulation.

Regulation V. 1803—Sections IV, V, VI, VII, X, XI, XII, XIV, XV, XVI, XVIII, XIX, XX, XXI, XXII, XXVIII, XXIX, and XXXVII.

Regulation XXI. 1803—The whole Regulation.

Regulation L. 1803—Clause 2 of Section II so far as it relates to the Civil Courts.

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Regulation IX. 1831—Sections II, VIII, and so much of Section X as extends those Sections to the Sudder Dewanny Adawlut for the North-Western Provinces.

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